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In The
Supreme Court of the United States

**C.M., a minor, by and through her parents;
J.M. and E.M., and on their own behalf,**
Petitioners,

v.

**THE BOARD OF EDUCATION OF HENDERSON COUNTY,
a/k/a Henderson County Public Schools; DAN G. LUNSFORD,
Education Department Superintendent; LINDA R. HAWK, Chairman;
JACKIE H. HORNSBY, Vice Chariman; ERVIN W. BAZZEL;
BRENDA O. BROCK; ALLEN A. COMBS; THOMAS E. ORR;
THOMAS B. PRYOR; JUDY DIANE HARTMAN COOK,
in their official and individual capacities,**
Respondents.

**M.E. and P.E.,
on their behalf and on behalf of their son, C.E.,**
Petitioners,

v.

**THE BUNCOMBE COUNTY BOARD OF EDUCATION,
a/k/a Buncombe County Public Schools,**
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the application of a sixty day statute of limitations, within which a family must file their initial due process action violates the federal policies underlying the Individuals with Disability Act?

PARTIES TO THE PROCEEDING

In addition to those parties listed in the caption, the State of North Carolina participated in the case before the Fourth Circuit Court of Appeals as an Intervenor. The United States of America and the North American School Boards Association participated as Amici Curiae.

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PETITION FOR A WRIT OF CERTIORARI

CM, a minor, by and through her parents, JM and EM, and on their own behalf, and M.E., and P.E., on their behalf and on behalf of their son, C.E., Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 241 F.3d 374 and is reprinted at App. A-1 through A-29. The opinion of the district court is unpublished and is reprinted at App. A-30 through A-70 The opinion of the Administrative Law Judge is unpublished and is reprinted at APP. A-71 through A-106.

JURISDICTION

The Fourth Circuit Court of Appeals entered its judgment on February 21, 2001. No Motion for Rehearing and Reconsideration was filed. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Section 1254(1). Subject matter jurisdiction provides for judicial review and review of IDEA disputes.

Appellate jurisdiction exists as a matter of right. 28 U.S.C. § 1291 and FRAP 4. Judgment of the court of appeals was entered on February 21, 2001. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Individuals with Disabilities Education Act ("IDEA"), Part B, 20 U.S.C. § 1400 *et. seq.*, does not contain a statute of limitations provision. When Congress fails to provide a statute of limitations, federal courts borrow the most analogous state statute of limitations, provided that it is not inconsistent with underlying federal policies. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 (1985).

The applicable implementing regulations for the IDEA related to this cause are 34 C.F.R. § 300.512(a)-(c).

STATEMENT OF THE CASE

A. Nature of case

In *C.M. v. The Board of Education of Henderson County*, 241 F.3d 374 (4th Cir. 2001), C.M. is a young girl, who at the approximate age of 2.5 years old, was diagnosed as suffering from autism. At that time her family lived in New Hampshire. After attempting an unsuccessful intervention for approximately one year, the family became aware of a program in North Carolina developed by the Division for the Treatment and Education of Autistic and Communication Handicapped Children ("TEACCH"). They moved to Henderson County, North Carolina. There, an Individual Education Program ("IEP") was developed and CM was enrolled in a TEACCH based program with the defendant school district. The child attended that program for slightly over three months pursuant to an IEP.

In addition to the IEP, the parents arranged for services at a local TEACCH facility in the nearby city of Asheville, NC. When those programs failed to produce any significant improvement or progress, Plaintiffs withdrew their daughter from Defendant's school and the TEACCH facility.

They then established an intensive private program developed by Dr. O. Ivar Lovaas, consisting of approximately forty hours of one-on-one therapy per week, fifty weeks a year. Having tested that private program for approximately nine months and established exceptional success, in December 1994, Plaintiffs sought to have the school district adopt and fund that program.

Their request sparked a series of 10 IEP meetings and 23 evaluations that took place from December 1994 until September of 1996. Disagreements over the evaluations and the IEPs resulted in two due process petitions which were consolidated. Through her Lovaas program, CM continued to make substantial, steady progress which was documented in her therapy logs, in standardized tests and through ever increasing complexity of each draft IEP developed.

In spite of her remarkable gains, the School District refused to consider CM's Lovaas program as a possible option. Instead, they insisted on designing a program that would allow for her placement into one of their existing TEACCH based facilities. In turn, the parents continually rejected the previously proven unsuccessful TEACCH program. However, the parties continued to meet and work on IEPs for CM.

As the parties reached impasse in their negotiations, the parents filed due process petitions. The Administrative Law Judge ("ALJ") and the State Review Officer ("SRO") found that CM's IEP should have included a provision for her Lovaas trained aide to help her to transition to the school's program. (App. p. 102 ¶95, p. 104-105 ¶12) Because their decisions were issued well beyond the maximum time lines allowed by the Act, (255 days beyond the close of evidence at the local level and 73 days beyond the filing of the appeal at the state level) CM was not able to take advantage of that provision of the decisions. These failures to meet the time constraints were excused by The District Court and the Fourth Circuit Court of Appeals.

In addition to excusing the failure to meet the maximum legislated time lines, the Fourth Circuit concluded the application of the 60 day statute of limitations found in North Carolina's Administrative Procedures Act for initiating Contested Case (Due Process) petitions, did not violate the underlying policy of the IDEA.

B. Course of Proceeding

In the C.M. case, disagreements among Plaintiffs and Defendants over the evaluations and the IEPs resulted in two due process petitions being filed. Those petitions were consolidated prior to the local level due process hearing below. Approximately two and a half weeks prior to the date the hearing was to begin (following the last continuance by consent), Defendants filed a motion seeking summary judgment on all issues based on the North Carolina sixty (60) day statute of limitations applicable to seeking relief under the North Carolina Administrative Procedures Act.

The ALJ granted Defendant's motion for the 1995/96 and all prior years. That partial summary judgment was affirmed by the SRO and the District Court Judge ("DCJ").

In *M.E. v. Buncombe County Board of Ed.*, 241 F.3d 374 (4th Cir. 2001) case, the ALJ granted the school district's motion for summary judgment on the second day of the due process evidentiary hearing, and dismissed the case. That decision was affirmed by the SRO and the District Court Judge.

At the Fourth Circuit, the cases were consolidated. The Department of Justice filed an Amicus Brief in the *M.E.* case opposing the 60 day limitations period. The Attorney General for the State of North Carolina was allowed to intervene on behalf of the Defendant in the *M.E.* case to argue for the enforcement of the 60 day limitations period.

In its decision, the Fourth Circuit Court of Appeals adopted the 60 day statute of limitations found in North Carolina's Administrative Procedures Act for initiating Due Process petitions, concluding it did not violate the underlying policy of the IDEA because it contained a notice provision. The Fourth Circuit reversed the DCJ decisions dismissing the cases based on the 60 day statute of limitations, concluding the school district had not provided Plaintiffs with proper notice that the limitations period had begun to run and remanded the case for further proceedings.

C. Disposition of Courts Below

In the *C.M.* case, on October 12, 1999 the District Court Judge entered final judgment against Plaintiffs and adopting the 60 day statute of limitations found in North Carolina's Administrative Procedures Act for initiating Due Process petitions, concluding it did not violate the underlying policy of the IDEA. In the *M.E.* case, on December 17, 1999 the District Court Judge entered final summary judgment against Plaintiffs also applying the 60 day statute of limitations.

The Fourth Circuit Court of Appeals affirmed his decisions to adopt the 60 day statute of limitations found in North Carolina's Administrative Procedures Act for initiating Due Process petitions. It concluded that limitations period did not violate the underlying policy of the IDEA because it contained a notice provision. The Fourth Circuit then reversed the District Court decisions concluding the school district had not provided Plaintiffs with proper notice that the limitations period had begun to run and remanded the case for further proceedings.

REASONS FOR GRANTING THE WRIT

The United State Court of Appeals for The Fourth Circuit has entered a decision in this cause that is in conflict with the decision of the Eighth Circuit Court of Appeals. In doing that it has decided an important federal question in a way that conflicts with relevant decisions of this Court.

No policy consideration can justify denying a handicapped child services under the guise of prompt resolution. In rejecting similar arguments regarding a 30-day statute of limitations found in the Arkansas Administrative Procedure Act the Eighth Circuit Court of Appeals in the case of *Birmingham v. Omahas School Dist*, 220 F.3d 850 (8th Cir. 2000) concluded:

> . . . Contrary to the district court's conclusion, the AAPA is not closely analogous to the IDEA. . . *Id.* at 854.
>
> Because the standard of review, scope of review and evidence considered differ significantly under the IDEA and AAPA, the statutes are not closely analogous. Even if they were, however, the district court erred by borrowing the AAPA's thirty-day statute of limitations because it violates IDEA policies.
>
> **The IDEA mandates** that all disabled children have the opportunity to receive a free appropriate public education, and **that the child's rights and those of his/her parents are protected.** See 20 U.S.C. § 1400(d)(1)(B). **The IDEA also encourages parents and school officials to resolve disputes over the disabled child's education**, so that the child is not needlessly deprived of the education mandated by law. *See Murphy v. Timberlane Reg'l Sch. Dist.*,22 F.3d 1186, 1193-94 (1st Cir. 1994).

> Both of these policies are violated by a thirty-day statute of limitations. **Thirty days does not allow parents sufficient time to work with school officials to resolve educational disputes. Useful discourse that may resolve such disputes is foreclosed because parents are forced to immediately litigate.** The period also does not consider the scope of review in an IDEA case. Although thirty days may be long enough for an AAPA action, where review is limited to the record, it is insufficient for an IDEA claim because review is de novo and may expand beyond the record.
>
> **On a practical note, the truncated limitations period does not take into account the realities of raising a disabled child. Disabled children can require considerable parental attention, which leaves parents limited time to prepare a lawsuit. Borrowing a thirty-day limitations period would prevent many parents from bringing valid IDEA claims, simply because of their child's disability--an effect abhorrent to the IDEA.** (Emphasis added) *Birmingham,* at 855.

It is submitted these policy considerations would not be affected by a 60 day statute rather than a 30 day statute as the Court looking at alternative statutes of limitations, settled on the 3 year limitations period for personal injury actions concluding it "does not violate IDEA policies. A three year statute of limitations encourages parents to work with school officials to resolve disputes over the disabled child's education." *Birmingham,* at 856

Previously, the Fourth Circuit seemed to recognize these policy considerations. In *Schimmel v. Spillane*, 819 F.2d 477 (4th Cir. 1987), the Fourth Circuit undertook a thorough and detailed discussion of the policy issues which cause the application of a short 30-60 day limitations period to be inappropriate for IDEA cases. *Schimmel*, is not directly on point because it dealt with a parent's failure to file a notice of appeal within the sixty day appeal period after receiving an adverse decision following a state level review of a due process hearing. The case at bar deals with the filing of an initial due process petition following IEP meetings.

It is significant that the Schimmels received two hearings on the merits before being barred by the statute of limitations. The harshness of prohibiting a hearing on the merits under the guise of pursuing speedy resolution is unconscionable. Proceedings within the Administrative Process are supposed to progress in a less formal manner so they can be accomplished without the need for an attorney. Thus, all of the policy considerations noted in *Birmingham, supra* and *Schimmel* for not imposing a short thirty or sixty day statute of limitations for appeals from administrative hearings become even more compelling relative to the filing of the initial petition.

In considering the sixty day limitations in relation to the Education of Handicapped children Act ("EHA"), The *Schimmel* Court wrote:

> . . . In our view, however, the district court was correct in refusing to apply this statute of limitations to bar the Schimmel's suit, because **application of this very short limitations period would conflict with the federal policies underlying the EHA.** *Schimmel supra* at 482 (Emphasis added.)

. . . In addition to our concern that unrepresented parties not be unfairly penalized by a very short limitations period for filing suit, we note that other courts have identified other policies underlying the EHA that could be frustrated by application of a short statute of limitations. *See, e.g., Janzen*, 790 F.2d at 487-88 **(application of sixty-day limitations period would effectively restrict independent review Congress intended courts to have; would inhibit collection of evidence necessary to orderly review; and would undermine EHA's policy of encouraging parents to participate in decisions affecting placement of handicapped children)**; *Scokin*, 723 F.2d at 437 (thirty-day statute of limitations would frustrate EHA's goal of encouraging parental involvement and could result in inappropriate placement of handicapped children, contrary to policies of EHA); *Tokarcik*, 665 F.2d at 451-53 **(thirty-day limitations period would frustrate "statutory policy of cooperative parental and school involvement in placement determinations"; could lead to inappropriate placement decisions; and would limit the independent review courts are intended to exercise under the EHA)**. These additional concerns bolster our conclusion that application of the very short limitations period of the Virginia Administrative Process Act would be inappropriate in this case. *Schimmel*, *supra* at 482-483. (Emphasis added.)

The school system argues that application of the statute of limitations specified in Va. Sup. Ct. R. 2A:2 and 2A:4

> **would actually advance the federal policies underlying the EHA, in that it would ensure speedy resolution of disputes concerning appropriate education for handicapped children.** Undoubtedly, one important policy of the EHA is to encourage the prompt resolution of disagreements about the education of handicapped children so that such children will not be harmed by long delays before being placed in appropriate educational settings. *See* 121 Cong. Rec. 37416 (1975) (remarks of Senator Williams). **We are unwilling, however, to say that this interest in prompt resolution takes precedence over the other federal policies we have identified that could be undermined by application of a very short limitations period. In our view, the need for speedy resolution of disputes does not outweigh the risk that a very short statute of limitations may deny parties a fair opportunity to obtain judicial review** of adverse decisions rendered in administrative due process proceedings. **Furthermore, we believe that the natural desire of parents to secure an appropriate education for their children will motivate parents to seek such judicial review promptly.** Other courts have agreed. . . . *See, e.g., Janzen*, 790 F.2d at 488; *Scokin*, 723 F.2d at 437. *Schimmel supra* at 483. (Emphasis added.)

The *Schimmel* Court's footnotes are also instructive on the issue of the inappropriateness of applying a short 30 or 60 day statute of limitations.

[3] **We note that the Schimmels were represented by counsel at all stages of their administrative due process hearings.** The EHA provides that parties to such hearings have "the right to be accompanied and advised by counsel. . . ." 20 U.S.C. Sec. 1415 (d)(1). (Emphasis added)

[4] The **school system argues** that application of the two-tiered limitations period set forth in Va. Sup. Ct. R. 2A:2 and 2A:4 **would give parties a period of 60 days** within which to file suit following an adverse decision rendered in a due process hearing. We note that at least one district court has specifically considered this argument and rejected it. *See Kirchgessner* 632 F. Supp. at 620 and n.3. In any event, **we are not convinced that application of a 60-day limitations period would so far ameliorate the problems of unrepresented parties as to obviate the concerns expressed in this opinion.** *Schimmel, supra* at 482 (Emphasis added)

In the case *Shook v. Gaston County Bd. Of Edu.*, 882 F.2d 119 @121 (4th Cir. 1989), the Fourth Circuit had previously held:

> The three-year statute of limitations in North Carolina within which to bring a reimbursement suit based on the E.H.A. is found under N.C.G.S. § 1-52(2). However, as the district court properly found in this case, that statute was tolled by Karen's infancy and incompetency pursuant to N.C.G.S. § 1-17(a). *Shook*, at 121.

N.C.Gen.Stat. § 1-52 provides:

> § 1-52. Three years
>
> Within three years an action--
>
> (2) Upon a **liability created by statute**, either state or **federal**, unless some other time is mentioned in the statute creating it. (Emphasis added)

Petitioners contend this is the proper statute to be applied in IDEA cases because the IDEA is a Federal statute that contains no statute of limitations.

Prior to the *C.M.* case, the Fourth Circuit had also recognized the policy consideration of encouraging negotiation rather than the filing of a law suit. In *Cf. Combs v. School Board of Rockingham County*, 15 F.3d 357, 364 (4th Cir. 1994), The Court discussed the adverse affect that might result if it encouraged potential litigants and their attorneys to pursue legal claims prior to attempting simpler resolution of problems under the careful construct of the IDEA. In denying attorneys fees to the petitioner in *Combs, supra*, the Court suggested: ". . .School Boards must be given adequate notice of problems if they are to remedy them, and **must be given sufficient time to respond to those problems** before they can be held liable for failure to act." *Id.* at 363-364. There is no reason to believe that families are in any less need of time to respond to problems than school boards. How can families be expected to give adequate notice to school boards if the families are not even given adequate time to consider an IEP prior to losing the right to contest it in a due process hearing? The simple answer is they cannot.

It is also significant that the Office of Special Education Programs ("OSEP") has also twice ruled that a 60 day statute of limitations is unenforceable under the IDEA. *Raskin, Letter to*, 17 EHLR 1116 (OSEP February 25, 1991);

Pawlisch, Letter to, 29 IDELR 1088 (OSEP October 22, 1997).

In its decision in *C.M.* and *M.E.*, the Fourth Circuit attempted to distinguish *Birmingham*, because the Arkansas APA does not contain a notice provision. The entire linchpin for the Fourth Circuit's decision turns on the notice provision. However, the notice provision does not impact any of the policy considerations cited by the *Birmingham* court or the *Schimmel* court. In fact, with the great majority of IEPs being completed in April or May for the following August or September school term, unless the family preserved its rights by filing a due process petition, the statute of limitations will have expired before the child has an opportunity to try the proposed program.

The *C.M.* Court wrote:

> . . . Accordingly, although we recognize that in *Schimmel* we concluded that policies embodied in the IDEA required that we reject a short limitations period, we believe a different result is required here. Principally because the statute at issue here, unlike that in *Schimmel*, contains an express requirement of clear and unambiguous notice of the agency action and of the commencement and time of the limitations period, and also because, again unlike *Schimmel*, the state expressly designated that this abbreviated limitations period govern IDEA administrative proceedings, we conclude that adoption of this 60-day limitations period is not inconsistent with federal policies animating the IDEA. (App. 22)

The 60-day period applies generally to matters filed under North Carolina's Administrative Procedure Act. Thus, whether this were an Alcoholic Beverage Commission case

or Department of Natural Resources case, the same abbreviated limitations period would apply. Contrary to the Court's conclusion, this was not a limitations period specifically established for IDEA cases.

The *C.M.* Court also wrote:

> . . . A school system cannot make parents "notice-proof" simply by periodically distributing publications containing the law setting forth the "right, procedure, and time limit" of a request for a due process hearing. *See generally Canada Life Assurance Co. v. Lebowitz,* 185 F.3d 231 (4th Cir. 1999). *C.M., supra* at 388.

By adopting the sixty day statute of limitations, the Fourth Circuit has effectively made this seemingly all important notice provision meaningless. It also converted the short time limitations that Congress established to help disabled children into a weapon that school districts will now use to deny them access to the judicial process for valid claims.

In *C.M.*, the proper application of the short time limitations established by Congress would have resulted in a decision in favor of C.M. because of the failure to meet the 45 day and 30 day limitations found in 34 C.F.R. § 300.512(a) & (b).

Contrary to the holdings in both *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, (1982) and *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985), the courts below overlooked the importance of the complying with this all important procedural safeguard. Rather than issuing the decision within the requisite 45 days from the filing of the due process petition, the local level due process decision was issued December 11, 1997, some 534 days after the Initial Petition for Contested Case Hearing was filed, 405 days after the Second Petition for Contested Case

Hearing was filed, 283 days after the last consented to continuance, 269 days after the last continuance granted pursuant to a motion by Defendant and 255 days after the evidentiary hearing was concluded (April 16, 1997) (Dist. Court Decision App. 60). The State Review Officer more than doubled the maximum 30 days allowed for his decision. His was issued in 73 days. (Dist. Court Decision App. 60)

Because the decisions were issued so far beyond the requisite deadlines, C.M. was not able to take advantage of the requirement to have a Lovaas trained aide assist in her transition to the school's program. (ALJ Decision App. 102 ¶95 and 104-105 ¶12)

CONCLUSION

For the above reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted to resolve the conflict among the Circuit Courts of Appeal and to correct the misapplication of the unconscionably short statute of limitations which clearly undermines the underlying policy of the IDEA and properly apply the time limitations imposed by Congress.

Respectfully submitted, this the 22nd day of May, 2001.

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-2533

CM, a minor, by and through her parents, JM and EM, and on their own behalf,

Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF HENDERSON COUNTY, a/k/a Henderson County Public Schools; DAN G. LUNSFORD, Education Department Superintendent; LINDA R. HAWK, Chairman; JACKIE H. HORNSBY, Vice Chairman; ERVIN W. BAZZLE; BRENDA O. BROCK; ALLEN A. COMBS; THOMAS E. ORR; THOMAS B. PRYOR; JUDY DIANE HARTMAN COOK, in their official and individual capacities,

Defendants-Appellees,

STATE OF NORTH CAROLINA,

Intervenor.

No. 00-1101

M.E.; P.E., on their behalf and on behalf of their son, C.E.,

Plaintiffs-Appellants,

v.

THE BUNCOMBE COUNTY BOARD OF EDUCATION, a/k/a Buncombe County Public Schools,

Defendant-Appellee,

and

STATE OF NORTH CAROLINA,

Intervenor.

UNITED STATES OF AMERICA; NORTH CAROLINA SCHOOL BOARDS ASSOCIATION,

Amici Curiae.

Appeals from the United States District Court
for the Western District of North Carolina, at Asheville.
Lacy H. Thornburg, District Judge.
(CA-98-66-1, CA-99-3)

Argued: December 4, 2000
Decided: February 21, 2001
Entered: February 21, 2001

Before WIDENER and MOTZ, Circuit Judges, and Terrence W. BOYLE, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed in part and reversed and remanded in part by published opinion. Judge Motz wrote the opinion, in which Judge Widener and Chief Judge Boyle joined.

COUNSEL

ARGUED: Paul Lawrence Erickson, THE LAW FIRM OF PAUL L. ERICKSON, Asheville, North Carolina; Peter W.D. Wright, Deltaville, Virginia, for Appellants. Kevin Kendrick Russell, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae United States. Ann L. Majestic, THARRINGTON SMITH, L.L.P., Raleigh, North Carolina; Christopher Zemp Campbell, ROBERTS & STEVENS, P.A., Asheville, North Carolina, for Appellees. Joyce S. Rutledge, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Intervenor. **ON BRIEF:** Michael F. Easley, Attorney General of North Carolina, Thomas J. Ziko, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Intervenor. Bill Lann Lee, Acting Assistant Attorney General, Mark L. Gross, Rebecca K. Troth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Judith A. Winston, General Counsel, Kala Shah Surprenant, UNITED STATES DEPARTMENT OF EDUCATION, Washington, D.C., for Amicus Curiae United States. Elaine M. Whitford, THARRINGTON SMITH, L.L.P., Raleigh, North Carolina; Allison B. Schafer, NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, Raleigh, North Carolina, for Amicus Curiae Association.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

We consider today, as a matter of first impression, whether a state statute, providing that a request for a due process hearing must be filed within sixty days of an agency decision, is inconsistent with the Individuals with Disabilities Education Act (IDEA). We conclude that as long as a party seeking such a hearing is supplied with the required statutory notice, this limitations period does not conflict with federal policies embodied in the IDEA.

I.

Both cases before us involve requests for IDEA services on behalf of autistic children. The North Carolina public school system has developed a nationally recognized program for educating autistic children known as the TEACCH program. But the parents of both children involved in these cases concluded that the Lovaas program, a rival method for the education of autistic children, offered their children more hope for a normal life. Accordingly, the parents placed their children in Lovaas therapy. When the parents asked school officials to reimburse them for the cost of the Lovaas program under the IDEA, those officials refused. Both sets of parents continued to negotiate for a time with school administrators, and then filed petitions for due process hearings. State administrative law judges (ALJs) dismissed all or most of the claims in these petitions as untimely.

We first briefly outline the statutory scheme at issue here and then the specific relevant facts of the two cases before us.

A.

The IDEA creates a federal grant program to assist state and local agencies in educating disabled children. See 20 U.S.C. § 1412 (1994 & Supp. IV 1998). To receive funds under the IDEA, states must provide disabled children with the opportunity to receive a "free appropriate public education," § 20 U.S.C. § 1412(a)(1), by providing special education and related services in an "individualized education program" (IEP). 20 U.S.C. § 1412(a)(4). "[T]o ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education," the IDEA requires states to establish and follow certain procedures. 20 U.S.C. § 1415(a). Among these is the requirement that, if parents of a disabled child and an educational agency disagree as to the appropriateness of an IEP or a question of financial responsibility, parents have the right to resolve the matter at an "impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f).

North Carolina has implemented the IDEA in N.C. Gen. Stat. § 115C-111, et seq. (1999). In this statute, as instructed by the IDEA, North Carolina has provided parents the right to an impartial due process hearing, which is referred to in state law as a "[r]ight of [r]eview" at a "contested case" hearing. N.C. Gen. Stat. § 115C-116(c); N.C. Gen. Stat. § 150B-23.

The IDEA itself imposes no time limit on the period in which parents may request a due process hearing. The chapter of the North Carolina code implementing the IDEA, however, directs that "[e]xcept as otherwise provided in this section, the administrative review shall be initiated and conducted in accordance with Article 3 of Chapter 150B of the General Statutes, the Administrative Procedure Act [APA]." N.C. Gen. Stat. § 115C-116(d).

The North Carolina APA, in turn, provides that "a contested case shall be commenced by filing a petition." N.C. Gen. Stat. § 150B-23(a). It further provides:

> Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by the placing of the notice in an official depository of the Unites States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. When no informal settlement request has been received by the agency prior to issuance of the notice, any subsequent informal settlement request shall not suspend the time limitation for the filing of a petition for a contested case hearing.

Id. § 150B-23(f) (emphasis added).

B.

In M.E., the family moved to North Carolina from Maryland in August 1995, after C.E. had been diagnosed as autistic at a TEACCH center in North Carolina. When the family arrived in North Carolina, C.E.'s parents initially placed C.E. in a Lovaas program. Pleased with C.E.'s

progress, in March 1996 his parents contacted the Buncombe County school authorities seeking funding for the Lovaas program under the IDEA. Extensive negotiations followed, including several meetings, letters, and the preparation of a draft IEP. C.E.'s parents repeatedly rejected any proposed placement of C.E. other than in the Lovaas program.

In June 1997, the parents decided that C.E. had substantially recovered because of the Lovaas therapy and wished him placed in regular public school classes. In that same month, C.E. was medically reevaluated and school officials agreed with the parents that C.E. was no longer disabled.

In July 1997, the parents again requested funding for C.E.'s past participation in the Lovaas program. The parents and attorneys for the Buncombe County Board of Education exchanged letters in August 1997 discussing "settlement" of this claim. In neither the August letters, nor in any prior or subsequent correspondence, did the Board state that it was providing written notice of its final decision to deny all but nominal reimbursement for the Lovaas program or that the applicable limitations period for filing a petition for a due process hearing was sixty days from the date of that denial. The Board did forward with one of the August letters a copy of the current IDEA notice and attorneys' fees provisions, as well as recently amended North Carolina "mediation provisions."

In April 1998, the parents filed a petition for a due process hearing, seeking reimbursement for C.E.'s Lovaas therapy. A state ALJ found that one of the Board's August 1997 "settlement" letters was "final rejection" of the parents' reimbursement claim, and that their petition had been filed 257 days after the August letter, on April 22, 1998. The ALJ concluded that the Board provided the parents "with the requisite notice pursuant to § 150B-23." Accordingly, the ALJ held that the parents' petition was

untimely. A state review officer affirmed this decision. The parents then filed a complaint in the district court, which granted summary judgment to the Board, reasoning that the ALJ had correctly ruled that the 60-day limitations period barred the claim.

The facts of CM are similar to those in M.E. CM was diagnosed with autism at age two and her parents brought her from New Hampshire to North Carolina to take advantage of the TEACCH program. In 1993, CM began the TEACCH program, where she made educational progress. However, after learning of Lovaas therapy, CM's parents removed her from TEACCH and enrolled her in the Lovaas program.

In December 1994, CM's parents asked Henderson County school authorities to fund her participation in the Lovaas program under the IDEA. After a series of meetings, school officials proposed an IEP - for the 1995-1996 school year, which placed CM in a full day program with TEACCH. This IEP was mailed to the parents on February 16, 1995, with an accompanying letter explaining why school officials believed that the IEP set forth an appropriate plan for CM. The February 16, 1995 letter also discussed the possibility of mediation, explaining that mediation "does not in any way limit or delay a formal due process hearing or other legal procedure." Finally, the letter noted that "[y]ou indicated that you have a copy of the Handbook of Parent's Rights, which outlines appeal options available" and forwarded another copy of the handbook to the parents. Again, neither in this letter nor in later communications did the school board state that it was providing written notice of its final decision to deny reimbursement for the Lovaas program or that the applicable 60-day limitations period for requesting a due process hearing had been triggered.

The parents responded by requesting first mediation and then a reevaluation of CM by outside consultants. Although the parents and school authorities exchanged

numerous letters, mediation never occurred; however, outside consultants did re-evaluate the child. As the previous IEP was about to expire, school officials began to prepare a new IEP for CM. After further negotiation and re-evaluation of CM, school officials and CM's parents participated in IEP meetings during August and September 1996 for the 1996-1997 school year. The 1996-1997 IEP again proposed placing CM in the TEACCH program, and the parents again objected, favoring the Lovaas program.

On November 1, 1996, the parents filed a petition for a due process hearing, seeking reimbursement for CM's participation in the Lovaas program for the 1993-1994, 1994-1995, and 1995-1996 school years and placement in Lovaas therapy in the 1996-1997 school year. That petition was consolidated with a petition that CM's parents had filed on June 25, 1996, seeking reimbursement for costs associated with obtaining outside evaluation of CM. On March 24, 1997, another state ALJ (not the ALJ that ruled in M.E.) found the parents' claims untimely and granted summary judgment to the Henderson County schools with respect to the reimbursement claims and assertion of IDEA violations in the 1993-1994, 1994-1995, and 1995-1996 school years. The ALJ reasoned that the parents' "rights to file a contested case expired 60 days after the February 16, 1995 correspondence." On December 11, 1997, after a multi-day hearing, still another ALJ entered a final order finding the 1996-1997 proposed IEP appropriate. On March 3, 1998, a state review officer affirmed all of these decisions.

The parents then filed a complaint in the district court seeking to recover on the claims rejected by the ALJs, asserting new IDEA claims for the 1997-1998 and 1998-1999 school years, and a host of other new contentions. Ultimately, the district court rejected all of the

parents' claims.[1] With respect to the 60-day limitations period, the court concluded that the ALJ had properly applied that limitations period to bar the parents' claims for the 1993-1994, 1994-1995, and 1995-1996 school years.

We consolidated M.E. and CM on appeal and permitted the State of North Carolina to intervene as an appellee, urging affirmance. We also permitted the North Carolina School Boards Association to appear as an amicus, urging affirmance, and the United States to appear as an amicus, urging reversal. We appreciate the assistance of the intervenor and amici.

II.

Although the IDEA itself sets no limit on the time in which parents may request a due process hearing, no party before us (nor any amici) maintains that parents have an unlimited period in which to request such a hearing. Rather, all agree that the most appropriate limitations period should be borrowed from state law and that borrowed period should control the time allowed to request an IDEA due process hearing.

When Congress fails to provide a statute of limitations, federal courts borrow the most analogous state statute of limitations, provided that it is not inconsistent with underlying federal policies. See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 240 (1985). Therefore,

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[1] In addition to arguments related to the limitations issue, CM raises other contentions on appeal including claims based on asserted procedural violations during the administrative process and a claim for reimbursement for the 1996-97 school year. We have considered all of these contentions and have concluded that the district judge properly rejected them. Accordingly, we affirm those portions of the judgment on the reasoning of the district judge. We also reject as meritless CM's contentions that asserted procedural irregularities in the district court require reversal.

we must first evaluate which North Carolina statute of limitations constitutes the most analogous limitations period. Next we must decide whether that period is in any way inconsistent with the federal policies contained in the IDEA.[2] The school board, the State of North Carolina, and their amicus contend that the most appropriate limitations period for an initial request for an IDEA due process hearing in North Carolina is 60 days and that this period should, therefore, be borrowed. They rely on N.C. Gen. Stat. § 115-116(d), which directs that initiation of administrative due process hearings in special education

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[2] The limitations period we consider today governs only state administrative hearings, access to which is traditionally governed by the states. It does not establish the period for filing an IDEA action in federal court. Indeed, the limitations period in question governs special education proceedings in a state tribunal that necessarily commence and conclude before a federal cause of action ever arises. See Kirkpatrick v. Lenior County Bd. of Educ., 216 F.3d 380, 387 (4th Cir. 2000) (IDEA cases in federal court are not "appeals" from state agency decisions, but rather original actions filed in district court). Because Congress arguably left the creation of a limitations period for requesting a state administrative hearing to the states, one might contend that "borrowing" is unnecessary here. However, we implicitly rejected this view in Manning v. Fairfax Co. Sch. Bd., 176 F.3d 235 (4th Cir. 1999), when we held, in a case from Virginia, that the borrowing analysis was the appropriate method of determining the limitations period for filing requests for IDEA administrative due process hearings. Moreover, the parents, the State of North Carolina, the United States, and the only two other circuits to have considered the question have all employed the borrowing analysis in this situation. See Strawn v. Missouri State Bd. of Educ., 210 F.3d 954 (8th Cir. 2000); Murphy v. Timberlane Reg'l Sch. Dist., 22 F.3d 1186 (1st Cir. 1994). Accordingly, we apply that analysis here. We note, however, that even if the choice of a limitations period was regarded as a matter left to the states, a federal court would still have to determine that a state's choice of limitations period did not conflict with the federal policies animating the IDEA. We believe that analysis would involve many of the same considerations discussed above and would lead to the same conclusion we reach here.

cases be conducted in accordance with the state administrative procedure act, which, in turn, provides 60-day limitations period. See N.C. Gen. Stat. § 150B-23(f).

The parents and their amicus, the United States, assert that borrowing this short limitations period would be "inconsistent with the IDEA's purposes because it ensures that many legitimate claims will be forfeited through inadvertence or inability to locate representation in such a short time, rendering ineffective the protections Congress created for children with disabilities." Brief of United States at 20. Furthermore, they maintain that such a short period would "interfere with attempts by the parents and school to seek an amicable resolution short of litigation by forcing administrative review almost immediately upon completion of the IEP process." Id. They suggest that North Carolina's catch-all three-year statute of limitations for statutory actions for which no limitations period is otherwise provided, see N.C. Gen. Stat. § 1-52(2), constitutes a better borrowing choice.

Logic virtually compels the conclusion that a state special education statute, specifically enacted to comply with the IDEA, like N.C. Gen. Stat. § 115C-116, constitutes the state statute most analogous to the IDEA. Accordingly, when a state legislature incorporates into its own special education statute a limitations period, as the North Carolina legislature has here, that period almost certainly constitutes the state limitations period for IDEA purposes. See generally Schimmel v. Spillane, 819 F.2d 477, 481 (4th Cir. 1987); see also Cleveland Heights-Univ. Heights Sch. Dist. v. Boss, 144 F.3d 391, 397 (6th Cir. 1998); Dell v. Board of Educ., 32 F.3d 1053, 1060 (7th Cir. 1994). Thus, we hold the 60-day limitations period in § 150B-23 is the period

associated with the state statute, § 115C-116, most analogous to the IDEA.[3]

Whether that 60-day statute of limitations is inconsistent with federal policies animating the IDEA, however, presents a more difficult question. To resolve it, we must first ascertain what policies Congress intended to further in the IDEA. Congress enacted the IDEA "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d).

To achieve that purpose, the Act embodies a federal policy that IDEA disputes should be resolved quickly to ensure that disabled children receive their statutorily guaranteed free appropriate public education while they can most benefit from it. The Act's requirement of yearly placement reassessment, 20 U.S.C. § 1414(d)(4), demonstrates Congress's understanding that children develop quickly, and that once-correct placement decisions can soon become outdated. If a limitations period is too long, remedies may be delayed by months or years of litigation and become anachronistic before ever being implemented. The Act's intent would obviously be thwarted if placement decisions were not carried out until after a

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[3] We recognize that Shook v. Gaston County Bd. of Educ., 882 F.2d 119 (4th Cir. 1989), involves a limitations period in an IDEA case from North Carolina. That case, however, concerned a statute of limitations for filing an IDEA action in federal court, rather than statute of limitations for an administrative claim. Moreover, in Shook, the sole question was whether a disabled adult could bring an action to obtain reimbursement for special education services incurred while she was a minor. We held she could. In doing so, we assumed, and no party argued to the contrary, that North Carolina's three year catch-all statute of limitations, N. C. Gen. Stat. § 1-52(2), applied, and we concluded that this statute had been tolled while the plaintiff was a minor. Because we had no occasion to consider § 150B-23(f) or even engage in the borrowing analysis, Shook with its vastly different focus provides no authority for application of § 1-52(2) rather than § 150B-23(f) in the case at hand.

child could benefit from those placements. Senator Williams, the IDEA's principal author, recognized this in the final Senate debate, stating that "I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development." 121 Cong. Rec. 37,416 (1975).

An equally important IDEA policy is to encourage parents to participate in the education of their disabled children and to provide them with the procedural tools to enforce the mandate of the Act. Indeed, the Supreme Court has specifically recognized the centrality of this federal policy:

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.

Board of Educ. v. Rowley, 458 U.S. 176, 205-206 (1982).

Thus, the IDEA requires that schools collaborate with parents in developing IEPs, 20 U.S.C. § 1414(d)(1)(B), directs states to provide a due process hearing for parents who disagree with school authorities' decisions involving their child's education, 20 U.S.C. § 1415(f), and establishes a parental right to file an action in federal court if dissatisfied with the result of that due process hearing, 20 U.S.C. § 1415(i)(2). An unduly short limitations period might eliminate the intended collaborative nature of the IDEA; parties will not continue to negotiate if parents are forced too quickly to initiate a due process hearing to preserve their rights. Moreover, to

take advantage of their right to a due process hearing and judicial review, parents must have sufficient time to understand any adverse decision by school authorities, evaluate any IDEA claim arising from an adverse decision, hire an attorney if necessary, and then proceed to challenge the adverse decision. Congress did not establish procedural rights as impediments to IDEA claims or as a means to foreclose parental involvement in their children's education. Rather, these rights were created to supply a simple and efficient method to encourage parental participation and facilitate parental enforcement of the IDEA.

So important did Congress find this policy that it specifically directed school officials to provide parents of disabled children with all necessary information regarding the procedures guaranteed by the Act so that parents could take advantage of its protections. For example, the IDEA requires school authorities to supply detailed written notice whenever they propose or refuse to initiate or change the identification, evaluation, or placement of a child. See 20 U.S.C. §§ 1415(b)(3) and (c). The Act also mandates that at several distinct phases of negotiations between parents and school officials, school officials must provide parents with a procedural safeguard notice. See 20 U.S.C. § 1415(d). Again, the notice must be detailed and, among other things, must contain information about the right to a due process hearing. See 20 U.S.C. § 1415(d)(2). The policy behind these detailed notice requirements is obvious. Congress wanted to eliminate the possibility that disabled children would lose their right to benefits or that parents would forfeit their role in their children's education because of ignorance of the Act and its procedural safeguards; hence, Congress placed the onus upon school authorities to inform parents of their IDEA rights.

In the context of original judicial IDEA actions (sometimes inaccurately described as "appeals" from state administrative due process hearings, see Kirkpatrick v. Lenoir Co. Bd. of Educ., 216 F.3d 380, 385 (4th Cir.

2000)), federal courts have struggled to accommodate these competing policies. Some have upheld short limitations periods as consistent with the policy of "speedy resolution of IDEA-related disputes" and simply ignored the question of whether such short periods improperly interfere with parental involvement and procedural rights. See, e.g., Boss, 144 F.3d at 397 & n.6 (adopting 45-day limitations period); Adler v. Educ. Dept. of New York, 760 F.2d 454, 459-60 (2d Cir. 1985) (adopting 4-month limitations period). Other courts have found short limitations periods fundamentally inconsistent with the IDEA's policy of "parental participation in decision making procedures" and its panoply of guaranteed procedural rights, and so have rejected such periods without much consideration of the countervailing policy of quick resolution of IDEA disputes. See, e.g., Birmingham v. Omaha Sch. Dist., 220 F.2d 850, 855 (8th Cir. 2000); Scokin v. Texas, 723 F.2d 432, 436-37 (5th Cir. 1984); Tokarcik v. Forest Hills Sch. Dist., 665 F.2d 443, 451-53 (3d Cir. 1981).

The better-reasoned cases have attempted to take account of all relevant federal policies. They have upheld a short limitations period only when satisfied that it was accompanied by features that could "significantly mitigate" infringement on procedural rights and parental participation; most notably, these courts have found a requirement in the IDEA that school authorities provide "clear notice" of the relevant limitations period. See, e.g., Spiegler v. District of Columbia, 866 F.2d 461, 467 (D.C. Cir. 1989). See also Amann v. Town of Stow, 991 F.2d 929, 932 (1st Cir. 1993). If parents receive such notice and nonetheless fail to act within the allotted time, their claims are barred, see Amann, 991 F.2d at 933, but if parents do not receive this notice, school authorities cannot invoke limitations against them, see Spiegler, 866 F.2d at 467.

In Schimmel, we, too, attempted to balance the various federal policies embodied in the IDEA. 819 F.2d 477. We concluded that a "very short limitations period

would conflict with the federal policies," and instead Virginia's one-year catch-all statute of limitations best furthered these policies. Id. at 482. Our "most serious concern" with the suggested alternative 30-day limitations period was that parents unrepresented by counsel might be "unaware of" and so "unfairly penalized by a very short" limitations period. Id. Although we recognized that it had been held that the IDEA required that "educational agencies inform parents of the applicable limitations period," it was "not clear to us" that the IDEA "actually impose[d] such a duty on educational agencies." Id. Moreover, in Schimmel, the Virginia 30-day statute of limitations clearly contained no such obligation, and the defendant school board specifically contended that "it had no duty to inform the [parents] of the statute of limitations." Id. Given these facts, we held that the "one-year statute of limitations . . . str[uck] an appropriate balance between the need for speedy resolution of disputes and the need to ensure that the parties have a fair opportunity to obtain judicial review." Id. at 483. [4]

Recently, in Manning v. Fairfax Co. Sch. Bd., 176 F.3d 235 (4th Cir. 1999), we considered what limitations period applied to initiation of IDEA administrative due process hearings in Virginia. We were not asked to apply a short "30 to 60-day statute of limitations," id. at 239 n.3, but rather, were faced with a choice of no limitations period, a five-year limitations period, or the one-year catch-all period. Id. at 238. In this context, we followed Schimmel and borrowed the same general one-year catch-all limitations period borrowed in that case. We reasoned that "[t]here is nothing to persuade us that

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[4] In Schimmel, we did not specifically resolve the question of whether the IDEA (in 20 U.S.C. § 1415(b)(1)(D)(1982) now recodified and expanded in § 1415(b)-(d)) requires educational agencies to inform parents of the applicable limitations period and we need not resolve that question in this case in view of the fact that N.C. Code § 150B-23(f) clearly does require this.

disputes in administrative IDEA proceedings are so different in nature from those in judicial IDEA actions as to justify application of disparate limitations periods." Id. at 239.[5] Moreover, we quoted with approval Schimmel's determination that the one-year limitations period struck an "appropriate balance" for the competing policies embodied in the IDEA, remarking that this period was "not so prohibitively short . . . that it undermine[d] the IDEA's policy of providing parents an opportunity to protect their disabled children's educational rights." Id.

Schimmel, Manning, and the out-of-circuit cases provide some helpful guidance in elaborating on the relevant policy concerns and appropriate balancing approach. Moreover, Schimmel establishes circuit precedent that a generally applicable, very short limitations period for IDEA actions in federal court, without any requirement that school authorities provide clear notice of

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[5] In so commenting, we did not hold that the two contexts present identical issues. In fact, some factors suggest that a longer limitations period might be warranted in the administrative context. After all, a failure to meet the administrative limitations period forecloses not just a federal judge's second or third look at a question, but any review of it by an impartial decision-maker. See Murphy, 22 F.3d at 1192. Furthermore, at the administrative due process hearing, parents must formulate the issues, gather evidence, prepare witnesses, and create a record; arguably, this task requires more time than that needed to prepare for judicial review. On the other hand, other factors suggest that a longer limitations period is appropriate in the judicial context. Arguably, preparing a complaint initiating a federal lawsuit, which must meet the requirements of federal law, requires more time and expertise than filing an informal one-page administrative petition. Moreover, Congress's concern that IDEA disputes be quickly resolved seems to have focused on eliminating lengthy administrative proceedings, rather than on limiting the time for seeking judicial review. See Tokarcik, 665 F.2d at 454 n.20. In sum, somewhat different issues are involved in the two contexts but these point both ways and in Manning we concluded that these differences did not justify adoption of different limitations periods. Of course, in Manning we were not confronted with the situation in which a state legislature had specifically enacted different limitations periods in the administrative and judicial contexts.

the limitations period, is inconsistent with federal policies embodied in the IDEA. Although in Manning we were not confronted with an argument urging adoption of a very short limitations period, we certainly suggested that for similar reasons such an abbreviated limitations period for initiation of an IDEA administrative due process hearing would also conflict with these policies. See Manning, 176 F.3d at 239 and n.3 (relying on Schimmel's determination as to the proper balance of federal interests, holding that the one-year period was "not prohibitively short," and noting that school authorities did not claim that a 30 or 60-day limitations period applied). However, no case -- not Schimmel, not Manning, not any of the out-of-circuit precedent-- has considered the application of a statutory scheme like that encompassed in N.C. Gen. Stat. § 115-116(d) and § 150B-23(f) to requests for IDEA administrative due process hearings.[6]

Indeed, the North Carolina statutory scheme apparently differs in a fundamental respect from any statute previously considered by any court in any IDEA context. It contains an explicit requirement that school authorities clearly and fully notify parents of the limitations period. Under North Carolina law, the 60-day limitations period only commences "when notice is given of the agency decision to all persons aggrieved who are known to the agency." N.C. Gen. Stat. § 150B-23(f). Moreover, "[t]he notice shall be in writing, and shall set forth the agency

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[6] The only other appellate opinions to have determined what limitations period applies to initial requests for IDEA due process hearings are no more apposite than Manning. See Strawn, 210 F.3d 954; Murphy, 22 F.3d 1186. Like Manning, neither involves a very short limitations period, or one requiring notice of its commencement. Rather, both Strawn and Murphy focus on determining whether a multi-year limitations period frustrated the federal policy that IDEA claims be quickly resolved. See Strawn, 210 F.3d at 957 (5-year limitations period is too long); Murphy, 22 F.3d at 1192-1194 (6-year limitations period not too long).

action, and shall inform the [aggrieved] persons of the right, the procedure, and the time limit to file a contested case petition." Id. (emphasis added). Thus, without clear and complete written notice that a final agency decision has been taken, that parents can contest the decision by filing a petition for a due process hearing, and that such petitions must be filed within 60 days of the contested agency decision, § 150B-23(f)'s abbreviated limitations period is never triggered. Not only do the school authorities concede that the statute so directs, see, e.g., Brief of Appellee Buncombe County Bd. of Educ. at 17 ("Section 150B-23(f) only applies to cases where a school system triggers the provision by providing written notice of the limitations period and notice of the school system's decision"), but a review of North Carolina case law indicates that its courts would not countenance any departure from, or relaxation of, statutory requirements. See Clay v. Employment Sec. Comm'n , 457 S.E.2d 725, 727 (N.C. 1995) ("Statutes of limitations `should be not extended by construction.'"); Pearson v. Nationwide Mut. Ins. Co., 382 S.E.2d 745, 748 (N.C. 1989) (requiring strict compliance with statutory notice requirement); Williams v. Bowden, 494 S.E.2d 798, 800 (N.C. App. 1998) (same); Cameron & Barkley v. American Ins. Co., 434 S.E.2d 632, 637 (N.C. App. 1993) (notice must be in exact form specified in statute).

Does § 150B-23(f)'s notice requirement sufficiently accommodate the federal policies we found inconsistent with the short limitations period in Schimmel? Obviously, this clear and specific notice provision does much to further the IDEA's strong commitment to informing parents fully of their procedural rights. It goes hand in glove with the extensive notice provisions contained in the IDEA itself. See 20 U.S.C. §§ 1415(b)(3), (c), and (d). Moreover, the notice requirement in § 150B-23(f) ameliorates "[o]ur most serious concern" in Schimmel, i.e., that parents would be "unaware of" and thus "penalized by a very short" limitations period. Schimmel, 819 F.2d at 482.

On the other hand, this 60-day limitations period (although twice as long as that at issue in Schimmel) does not provide a vast amount of time for parents to exercise the right to a due process hearing. This abbreviated time period also may be in some tension with the IDEA's policy of encouraging parental collaboration in placement decisions involving their children. Therefore, although the notice provision in § 150B-23(f) goes a long way to alleviating the concerns we voiced in Schimmel, it is not clear that such a provision alone makes an otherwise too-short limitations period acceptable. Given the holdings in Schimmel and Manning, if the 60-day limitations period at issue here had not been specifically selected by the state legislature to apply to these actions, it would be a close question whether circuit precedent required us to find it contrary to the policies embodied in the IDEA.

But, unlike the statutes at issue in Schimmel or Manning, the North Carolina legislature has specifically mandated that the 60-day limitations period applies to IDEA disputes. Thus, N.C. Gen. Stat. § 115(c)-116(d), the portion of the North Carolina Code implementing the IDEA and establishing IDEA due process hearings, provides that "administrative review shall be initiated and conducted in accordance" with N.C. Gen. Stat. § 150B-23, which in turn sets forth the 60-day limitations period. Moreover, in doing so, North Carolina has acted in full accord with the congressional directive that states conduct administrative due process hearings "as determined by State law." 20 U.S.C. § 1415(f).

Manning and Schimmel did not implicate an attempt by a state to legislate a statute of limitations specifically for IDEA proceedings. When a state does do this, as North Carolina has, we believe a federal court should give the chosen state limitations period special deference when determining whether it conflicts with policies animating the

IDEA. See Boss, 144 F.3d at 397.[7] Accordingly, although we recognize that in Schimmel we concluded that policies embodied in the IDEA required that we reject a short limitations period, we believe a different result is required here. Principally because the statute at issue here, unlike that in Schimmel, contains an express requirement of clear and unambiguous notice of the agency action and of the commencement and time of the limitations period, and also because, again unlike Schimmel, the state expressly designated that this abbreviated limitations period govern IDEA administrative proceedings, we conclude that adoption of this 60-day limitations period is not inconsistent with federal policies animating the IDEA.

III.

The parents in each case before us contend that even if we should hold, as we now have, that the 60-day limitations period applies to requests for IDEA administrative due process hearings in North Carolina, it does not bar their claims because they did not receive the required notice of the limitations period. The school authorities, of course, argue to the contrary. In each case they rely on certain letters sent to the parents.

In M.E., the school system maintains that two letters sent to the parents in response to the parents' settlement demand meet the statutory requirements of § 150B-23(f). On July 29, 1997, C.E.'s father mailed to the school system's representative a long letter attempting to settle the parents' claims for reimbursement and threatening resort to a due process hearing if the school board did not provide

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[7] Of course, if the choice the state has struck is totally inconsistent with the IDEA, a court must reject it. For example, a statute like that in Schimmel would still unacceptably conflict with federal policies even if it were part of a state special education statute specifically referencing the IDEA.

reimbursement within ten days. The school responded in letters dated August 7, 1997 and August 8, 1997. The first August letter states that the school system was inclined to make a counter-offer of "some portion of the expenses actually incurred," but notes that "[p]rior to making any offer, however, the Board of Education must be consulted and must approve the payment." The letter explains that school authorities hoped to obtain "settlement authority, if any, within the next week." It then notes the parents' ten-day threat and remarks that the parents "of course, have the right to file a due process petition at any time, however, the reality of school systems requires that the governing board be consulted and that process takes time." The letter encloses copies of the most current authorization of the IDEA and recent North Carolina legislation amending state IDEA mediation rules. The second letter is very short and simply makes a conditional counter-offer to settle the parents' claim for $6,000 pending "final approval by the Board."

In CM, school authorities rely upon a letter sent by the Director of Programs for Exceptional Children of the Henderson County Schools, to CM's parents on February 16, 1995. The letter accompanies that year's proposed IEP for CM and explains in some detail the decisions made in that IEP and the process leading to these decisions, including previous discussions with the parents. The letter then mentions the possibility of mediation, noting that while not mandatory "it is certainly a positive step in resolving differences" and "does not in any way limit or delay a formal due process hearing or other legal procedure." The letter concludes by noting that the parents had indicated that they had a copy of the North Carolina "Handbook on Parents' Rights, July, 1994, edition, which outlines appeal options available," and encloses another copy of the handbook.

In both cases, the ALJs determined that these facts demonstrated that the school authorities provided the

parents with the requisite notice pursuant to § 150B-23(b). We find no error in the historical facts found by the ALJs, but we believe that the ALJs misapplied the law to the facts; the school authorities did not provide the statutorily required notice. Although § 150B-23(f) does not require notice in a specific form, it does, as the school boards and State concede, mandate that parents be provided express written notice of the commencement of the limitations period. As the State puts it, "the 60-day statute -- by its terms -- cannot be applied to parents without notice." Brief of Intervenor State of North Carolina at 6 n.4; see also Brief of Appellee Buncombe County Bd. of Educ. at 16 ("In order for a claim to be barred by the 60-day limitation in North Carolina . . . a school system must affirmatively provide parents with notice of the 60-day limitation."). In neither M.E. nor CM did the school system "affirmatively provide" the parents with the required notice, and so "by its terms" the limitations period "cannot be applied to [the] parents."

Section 150B-23(f) instructs that the 60-day limitations period begins only when aggrieved persons are provided written notice "of the agency decision;" the notice must "set forth the agency action" and inform aggrieved persons of "the right, the procedure, and the time limit to file a contested case petition." N.C. Gen. Stat. § 150B-23(f). To satisfy these requirements, the written notice must communicate that the agency has acted and that this action is one that triggers the right to file, within sixty days, a contested case petition for a due process hearing. Unless the school authorities do this, parents, who will often have already engaged in lengthy negotiations with the school system, will likely (and understandably) conclude that a school is simply stating its present bargaining posture, which is open to further negotiation and does not trigger any limitations period. The instant cases illustrate this precise problem.

In M.E., the letters on which the school board relies merely articulate a conditional settlement counter-offer. They were part of on-going negotiations; offers and counter-offers exchanged in this context are rarely considered by their senders or recipients as the final word on anything, even when they claim to be so. Of course, the school system's letters here did not make this claim. Rather, both were expressly made contingent on approval by the Board of Education of Buncombe County. Indeed, it is hard for us to believe that, had the parents accepted the school system's counter-offer, and the Board had failed to ratify it, school authorities would not have expected more negotiations to have ensued thereafter.[8] These letters were part of a lengthy correspondence between the parents and the school.

There was nothing about them to indicate to the parents that they had more significance than any other letters received from school officials. Parents cannot be expected to divine that such correspondence communicates conclusive agency action, which can be challenged only by resort to a due process hearing and which triggers a short limitations period to pursue such a challenge.

The letter relied upon in CM suffers from similar deficiencies. It also is one in a series of communications between the school and the parents. Although it admirably describes in some detail the action taken by the school and the reason for that action, it does not in any way indicate that the action is more significant than earlier actions taken by the school as part of its continuing

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[8] As noted above, in the midst of the August 7 letter, the school system's representative stated that the parents had "the right to file a due process petition at any time." The parents maintain that this statement waived the school system's right to rely on the 60-day limitations period and estopped it from doing so. For the reasons stated by the district court, we reject these arguments. However, we believe that this comment does effectively demonstrate that the letters were regarded at the time, by the school system, as well as the parents, as a part of settlement negotiations, not as a notice of an appealable completed agency decision.

negotiations with the parents. Again, nothing in the letter signals to the parents that this letter, as opposed to other detailed letters from school officials received over a years-long negotiation process, triggered the limitations period. Indeed, the letter's discussion of mediation, which the parents then requested in writing four days later, combined with the many (more than 60) subsequent letters exchanged between the parties, could well have led the parents to conclude that this letter was nothing more than one in a series of negotiation communications. Again, a parent cannot be required to discern that such an innocuous letter constituted notice of decisive agency action, which could be controverted only by an impartial decision-maker after an administrative hearing, which had to be requested within sixty days of the letter.[9]

In sum, in neither case did the school systems' letters adequately notify the parents that school authorities had reached a final decision that could be challenged only in a due process hearing, which had to be requested within sixty days. See Powers v. Indiana Dept. of Educ., 61 F.3d 552, 558 n.7 (7th Cir. 1995) (holding that only when a parent "received a final denial" of her claim by state department of education did the limitations period begin). Cf. Spiegler, 866 F.2d at 649 (noting that even when a notice of denial of claimed IDEA benefits was held

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[9] As in M.E., for the reasons stated by the district court, we reject CM's claims that this letter provides grounds for estoppel because in it school authorities assertedly lured the parents into continuing to negotiate without ever raising limitations. By the same token, the school system's state- ment in the letter that mediation "did not in anyway limit or delay a formal due process hearing" could well, as the parents suggest, have confirmed their view that the parties could continue to negotiate without "in any way limit[ing]" the parents' future right to "a formal due process hearing." In other words, again as in M.E., the challenged statement, while not estopping the school system from relying on the 60-day limitations period, does evidence the "negotiating" character of the school system's letter.

otherwise deficient, school authorities informed parents that the decision was "final.").

Indeed, in neither case did the school systems' letters provide any indication of the letters' importance sufficient to lead a parent to suspect that those letters, among the many other similar letters received from the school boards, had far more significant legal consequences than appeared on their face.[10] Nor, contrary to the school boards' assertions, did distribution of the Handbook of Parents' Rights to the parents prior to these letters (and in CM again with the assertedly critical letter) remedy the inadequacies of the letters. The handbook is a 23-page single-spaced manual generally dispensed by local educational authorities to parents of special education children in North Carolina. The manual contains a summary of laws -- both the IDEA and the state special education laws -- "governing the rights of parents" of disabled children and a copy of federal regulations setting forth "procedural safeguards under the IDEA." On page 12, the manual states that a parent "may file a petition for an impartial due process hearing . . . to challenge the identification, evaluation, or placement of a child." In the next sentence, the manual states that "[i]n order to exercise the right to a due process hearing, the parent must file a

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[10] A school system's obligation to provide adequate notice is hardly burdensome. As M.E. points out, satisfactory notice could have been achieved as easily as adding a single sentence to the August 8 letter; such a sentence could have been worded: "Pursuant to N.C. Gen. Stat. § 150B-23 this letter constitutes your notice of final agency action, which you have a right to contest at a due process hearing by filing a contested case petition with the Office of Administrative Hearing; that petition must be filed within sixty days of receipt of this letter or you will lose your right to contest this action." The record in these cases reveals that North Carolina ALJs and state hearing review appeal officers routinely include similar language in their opinions. Moreover, other boards of education in North Carolina have apparently had little difficulty complying with the notice requirement. See, e.g., Glen III v. Charlotte-Mecklenberg Sch. Bd. of Educ., 903 F. Supp. 918, 925 (W.D.N.C. 1995).

petition within 60 days of written notice of the contested action."

Unquestionably, the handbook provides parents with information as to the correct procedure for filing a request for a due process hearing and the length of the limitations period. What it does not do is tell parents that the school system has issued a decision involving their particular child that triggers commencement of the time limitations for filing a request for due process hearing. A school system cannot make parents "notice-proof" simply by periodically distributing publications containing the law setting forth the "right, procedure, and time limit" of a request for a due process hearing. See generally Canada Life Assurance Co. v. Lebowitz, 185 F.3d 231 (4th Cir. 1999).[11]

The very reason that the North Carolina Supreme Court has refused to extend statutes of limitations "by construction" is to "ensure that parties have notice of the time limits applicable to their cases." Clay, 457 S.E.2d at 727 (emphasis added). Unless parents are informed that an agency decision in their case has triggered the limitations period, simply notifying them of the general right, procedure, and time limitation to request a due process hearing is worthless. In holding that there had been no satisfactory compliance with another statutory notice requirement, we recently explained that statutory protections "are meaningless" if those sought to be protected "do not know of their existence," Thomas v. Grand Lodge of Int'l. Ass'n. of Machinists & Aero.

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[11] For this same reason, the fact that one of the parents is an attorney, familiar with special education law, does not cure the deficiency in the letters. For purposes of this appeal, we assume that the attorney-parent had actual knowledge that § 150B-23(f) required that a request for a due process hearing be filed within 60 days of an agency decision in order to contest that decision at a formal due process hearing. However, nothing in the record indicates the attorney-parent had actual knowledge that school authorities had issued what they considered to be an agency decision triggering this limitations period, and the parent specifically denies such knowledge.

Workers, 201 F.3d 517, 520 (4th Cir. 2000); so, too, statutory protections are meaningless when those sought to be protected do not know that the limited time for invoking those protections has commenced.

Neither the letters relied on in these cases nor the handbook distributed to the parents sufficiently notified them that school authorities no longer intended to negotiate, that they had reached a conclusive decision that could only be challenged at a due process hearing, which the parents had to request within sixty days of receipt of the letters.

Accordingly, the school boards did not comply with § 150B-23(f) and so cannot invoke that statute to bar consideration of M.E.'s claim to reimbursement or CM's claim to reimbursement for the 1995-1996 school year.[12]

IV.

To summarize, we affirm the district court's determination that the Board of Public Education of Henderson County provided CM with a free appropriate public education in the 1996-1997 school year. We reverse the district court's determination that § 150B-23(f) bars M.E.'s claim and CM's claim with regard to the 1995-1996 school year, and we remand both cases for further proceedings consistent with this opinion.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

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[12] The basis for the district court's holding in CM that school authorities provided notice with respect to the 1993-1994 and 1994-1995 school years is unclear. It appears that the district court may not have actually resolved this issue, focusing only on the notice provided as to the 1995-1996 year. We remand this issue to the district court, expressing no view on whether notice complying with the statute was provided in the earlier years. We also note that although the ALJ found CM's parents' claims for reimbursement in the 1993-1994 and 1994-1995 school years barred for additional reasons, the district court did not address these reasons, and so we will not consider them in the first instance.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
ASHEVILLE DIVISION

CIVIL ACTION NO. 1:98CV66

CM, a minor, by and through	)
her parents, JM and EM,	)
and on their own behalf,	)
	)
Plaintiffs,	)
	)
v.	)
	)
THE BOARD OF PUBLIC	)
EDUCATION OF HENDERSON	)
COUNTY a/k/a HENDERSON	)
COUNTY PUBLIC SCHOOLS, et., al.	)
	)
Defendants.	)

Entered: October 12, 1999

MEMORANDUM OF DECISION

THIS MATTER came on for trial before the undersigned on August 19, 1999. Having considered the arguments of counsel, pleadings submitted and the administrative record, the Court enters the following findings of fact and conclusions of law.

I. PROCEDURAL HISTORY

JM and EM on behalf of CM, their autistic child, initiated this action pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400, *et.*

seq. [1]**20 U.S.C. § 1401(a)(1)(A)(i).** Plaintiffs claim that the Henderson County Board of Education (County) denied a free appropriate public education (FAPE) to their child, as required by the IDEA. **20 U.S.C.§ 1401(a)(18).**[2] On December 11,1997, Administrative Law Judge (ALJ) Meg Scott Phipps found that the County had offered to provide the child with a FAPE as required by federal and state law. Plaintiffs filed an administrative appeal and State Review Officer (SRO) Joe Walters affirmed the ALJ's decision on March 4, 1998. Having exhausted their administrative remedies, the parents brought this action pursuant to the IDEA. **20 U.S.C. § 141 5(e)(2).**

By Order filed June 16, 1999, the undersigned disposed of several matters in this action. Chief Julian Mann granted partial summary judgment to the County as to Plaintiffs' claim for reimbursement for an independent educational evaluation above the sum of $1,200. He also ruled that all claims prior to the 1996-1997 school year were time-barred. The undersigned affirmed those rulings, finding that Judge Mann's conclusions were supported by a preponderance of the evidence. In addition, the Plaintiffs' claims pursuant to the Rehabilitation Act, the Americans with Disabilities Act, 42 U.S.C. § 1983, and the 14th Amendment to the Constitution as well as all claims asserted against the individual Defendants were dismissed. Plaintiffs'

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[1] The disorder of autism is defined as a "preoccupation with inner thoughts, . . . egocentric, subjective thinking lacking objectivity and connection with reality." ***Dorland's Medical Dictionary*** **(28th ed. 1994).**

[2] That section defines the term "free appropriate public education" as "special education and related services that-- (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

claims for the school years 1997-98 and 1998-99 and for punitive damages were also dismissed. Thus, the only claims remaining relate to the 1996-97 school year: the IDEA claim for declaratory relief and a cause of action pursuant to N.C. Gen. Stat. § 115C-106.[3] ***See* Memorandum and Order, filed June 16, 1999, at 35-37.**

II. STANDARD OF REVIEW

Section 1415(e)(2) of Title 20, United States Code, provides in pertinent part that in "any action brought under this [statute] the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." The Fourth Circuit has instructed district courts to bear in mind that "the touchstone of IDEA is the actual provision of a free appropriate public education." ***Sellers by Sellers* v. *School Bd. of City of Manassas, Va.*, 141 F.3d 524, 527 (4th Cir.), *cert. denied*, 119 S. Ct. 168 (1998).**

The Supreme Court has held that a proper review of the state's determination requires a twofold inquiry. ***Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 201 (1982).** The district court must decide: (1) whether the State complied with the IDEA's procedural requirements in developing and implementing the Individualized Education Program (IEP) for the child at issue, and (2) whether the IEP is "reasonably calculated" to enable that child to receive educational benefits. ***Id.*, at 206-07.** The Court also instructed reviewing courts to make "independent decision[s] based on a preponderance of the evidence." ***Id.*** The Fourth Circuit refined this standard in *Doyle v. Arlington County Sch. Rd.*, 953 F.2d 100 4th Cir.

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[3] "The policy of the State is to provide a free appropriate publicly supported education to every child with special needs."

1991), where it held that findings of fact by ALJ's and hearing officers in IDEA cases "are entitled to be considered *prima facie* correct, akin to the traditional sense of permitting a result to be based on such fact-finding, but not requiring it." ***Id.*, at 105.** In essence, district courts must "'make an independent decision based on a preponderance of the evidence, giving due weight to state administrative proceedings.'" ***Board Educ. of Montgomery County v. Brett Y*, 155 F.3d 557 (table), 1998 WL 390553 at **5 (4th Cir. 1998) (quoting *Rowley*, 458 U.S. at 206).**

Moreover, the district court may not "substitute [its] own notions of sound educational policy for those of the school authorities." ***Hartmaun by Hartmann v. Loudoun County Bd. Of Educ.*, 118 F.3d 996, 999 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 688 (1998).** Indeed, the district court must defer to the State reviewing officer's (SRO) credibility determinations. ***Doyle, supra.*** And, the SRO must defer to the credibility determinations made by the hearing officer because he or she had the opportunity to hear the testimony. ***Id.*, at 104.** Finally, the burden of proof of establishing a violation of the IDEA falls on the party challenging the administrative findings. ***Barnett by Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991).**

As to the standard of review applicable to the state law claim, "[n]o distinction is made between federal and pendent state claims if the claims are brought in federal court. Although the North Carolina Administrative Procedure Act limits a state court reviewing an agency decision to substantial evidence review,. . . 'pertinent federal law. . . specifies otherwise.' The district court properly followed federal procedural law in reviewing independently both the federal and state law claims." ***Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 983 (4th Cir. 1990) (citations omitted).**

III. FINDINGS OF FACT

A. The IEP for the 1996-97 school year.

Plaintiffs moved from New Hampshire to North Carolina in 1993 for the sole purpose of placing their child in the TEACCH [4] program offered through the state's schools. **Volume III, Certified Transcript of Hearing before the Office of Administrative Hearings, at 13 (hereafter, Transcript, Vol. III, at 13.).** CM was first enrolled in the County school system in August 1993. **Exhibit A, Affidavit of Judy Cook, *attached to* Respondent's Brief in Support of Summary Judgment, filed in the Office of Administrative hearings on February 26, 1997.** An IEP was developed for her and she was placed in the Helping Hand Center which offered a TEACCH preschool program. ***Id.*** However, in November 1993, after only three months in the program, CM's parents withdrew her from the program in order to implement the Lovaas[5] program in their home and to place her in a Montessori preschool. ***Id.;* Respondent's Exhibit 72 before the Office of Administrative Hearings, Letter dated November 23, 1993, from JM to County.** The County continued to provide CM with free speech therapy, although not required to do so under state law.[6] **Cook Affidavit; Transcript, Vol. XI, at 132.**

In September 1994, JM met with Candy Priest, Supervisor of the Exceptional Children's Program for the County, to obtain a copy of CM's file. ***Id.*** During that

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[4] Treatment and Education of Autistic and Related Communication Handicapped Children program.

[5] Dr. Ivar Lovaas developed a form of treatment for autistic preschoolers.

[6] In fact, at the time of the hearing in 1997 the County continued to provide speech services to the child. **Transcript, Vol. XI, at 142.**

conversation, JM explained CM's progress in the Lovaas program and Ms. Priest volunteered that the County could provide services to CM in her preschool setting. ***Id.*, at 144.** JM declined, stating that he had not informed the preschool that CM was autistic but had advised only that she had a communication disorder. ***Id.***

However, in December 1994, the Plaintiffs approached the County about paying for the Lovaas therapy they were providing CM in their home. ***Id.*, at 144-45.** A series of meetings were held in January and February 1995 to develop an IEP for CM. ***Id.*, 145-46.** Ms. Priest testified,

> Over and over again it just kept coming back that—that, yes, we were proud of her academic skills, but what she absolutely had to do was use these skills and use her language to communicate functionally.... We were finding that C. could-could respond to a prompt, but that was—I mean, every time we saw her, someone had to say, "C., say hello," [T]here was always someone there with her, either guiding, moving her or... it was always a prompt and then expecting a response. And we in education know that's not—that's not how we-how we learn or how we progress or how we-how we survive in society.

***Id.*, at 150-51.** The County considered four options for CM: the Helping Hand Program, Sharon Burlingame's preschool handicapped classroom, the Lovaas program and the Bruce Drysdale's autistic classroom.[7] **Transcript, Vol. VI, at 196.** The County concluded the best option for CM was Bruce Drysdale's full-day autistic classroom with some mainstreaming into the regular kindergarten. ***Id.*, at 197.** By

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[7] Within the County is located the Bruce Drysdale School at which a classroom for autistic children was in existence.

mid-February, the County had completed the IEP for CM but her parents continued to insist that the County fund a Lovaas program. ***Id.*, at 204; Cook Affidavit.** There was no further contact from the Plaintiffs until June 1995, when they requested an independent educational evaluation of the child. **Cook Affidavit.** Because the last evaluation had been completed two years prior to that time, Ms. Cook felt it was necessary to obtain a more recent evaluation. ***Id.*** In the event the parents disagreed with that evaluation, they could then pursue an independent evaluation. ***Id.*** School personnel evaluated CM in August and September 1995. **Transcript, Vol. VIII, at 219-20.** Plaintiffs disagreed with the County's evaluation and requested an independent one be performed. **Cook Affidavit, *supra.*** Ms. Cook then sent them a letter outlining the procedures, including the $1,200 limit for reimbursement, and listing facilities and agencies competent to perform the evaluation. ***Id.*** Plaintiffs responded that four of those suggested were not competent to perform the evaluation, the fifth was rejected by the Plaintiffsas biased, and the sixth had a waiting list. **Respondent's Exhibit 117, Letter from JM to Judy Cook, dated January 5, 1996.** The parents obtained an evaluation from Dr. Jan Handleman in New Jersey, the full cost of which the County refused to reimburse. **Cook Affidavit, *supra.*** The undersigned has previously affirmed the grant of partial summary judgment on this issue by the ALJ on the ground that the parents were unreasonable.

Dr. Handleman issued his report on March *25,* 1996, and it was received by the County in April 1996.[8] **Respondent's Exhibit 57.** He concluded that "[a]pproximately forty hours a week of comprehensive behavioral programming is suggested, which emphasizes

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[8] Interestingly, before the County could review Dr. Handleman's report, the Plaintiffs had already reported to CM's preschool that she would be attending a small private school during the coming year. **Respondent's Exhibit 188.**

individualized and discrete-trial teaching[9].... Altering the current commitment to specialized and individualized programming could negatively impact on the very' positive gains that [CM] has made and the momentum she is demonstrating toward future educational accomplishments." *Id.* Dr. Handleman testified that he did not conduct any standardized tests on CM but reviewed test scores and records provided to him by the Plaintiffs. **Video Deposition of Dr. Jan Handleman.** He observed CM for two hours while she was with her Lovaas therapist. *Id.* In addition, he reviewed a video taken of CM by her mother. **Transcript, Vol. V, 42.** Dr. Handleman admitted that he had relied, in forming his opinion, on information which could have been incomplete. **Video Deposition, *supra.*** For example, he was unaware that CM's therapist was a recent college graduate. *Id.* The videotape showed CM's behavior as stabilized and compliant; but, he admitted that he was unable to assess any behavior which would not have been shown on the tape. *Id.* And, he admitted he was not provided with any information about the County's program except that given by the parents. *Id.*

At this point, the only IEP for CM was the one prepared in the fall of 1995. The Plaintiffs had submitted a copy of this IEP to Michael Guiou, their Lovaas consultant, who contested many of the assessments. **Respondent's Exhibit 9.** When Judy Cook received Dr. Handleman's report, she felt it did not add any substantive information which could be used in drafting a new IEP. **Transcript, Vol. VIII, at 224.** But, CM's parents and Mr. Guiou contended she had mastered many of the goals on the 1995 IEP and based on Dr. Handelman's report, the County could

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[9] "Discrete trial teaching (DTT) is one component of the Lovaas type of (applied behavioral analysis] and involves a directive followed rapidly with a consequence based on whether the student gives the correct response." ***T.H. v. Board of Educ. of Palatine Community Consol. Sch. Dist. 15*, 55 F.Supp.2d 830, 836 n.8 (N.D. Ill. 1999).**

not assess the validity of that contention. *Id.;* **Transcript, Vol. IX, at 18.** Moreover, Dr. Handleman's report contained no information concerning CM's current level of performance; it was simply an observation devoid of the type of information necessary to draft an IEP. **Transcript, Vol. IX, at 12.** Therefore, because CM's parents were challenging the 1995 IEP as inadequate and inappropriate, Ms. Cook felt an additional evaluation was appropriate, especially in view of the months which had passed. **Transcript, Vol. VIII, at 224.** As a result, Ms. Cook obtained, with the parents' consent, an informal assessment of CM by Dr. Victoria Shea, an expert on autism. **Transcript, Vol. VIII, at 225-28; Vol. XVIII, at 127-41.**

Dr. Shea observed CM at her preschool and in her home program for a total of three hours and received and reviewed her records. *Id.,* **at 228; Respondent's Exhibit 58.**

> By report and observation, [CM] demonstrates typical features of autism (i.e. impairments in social and communication skills, and unusual behaviors and interests). At the time of the last standardized assessment (8/95), she demonstrated widely scattered cognitive skills, low average adaptive skills, significant expressive language delays, and minimal fine motor delays. I observed [CM] to be very compliant with verbal directions from her tutors. In the absence of these verbal prompts, however, I observed several instances in which she was confused about what to do, where to go, how long to continue, or what would happen next.. . . The comments on [the County's] draft IEP by the UCLA consultant [Michael Guiou] indicated that the majority of the proposed objectives had been mastered. . .

However, there were [] skills described as mastered which I observed [CM] not to have mastered. These included responding to her name without prompting, making a choice between activities (several times when given a choice she said "yes"), washing her hands independently (she need a prompt to stop), and responding accurately to questions (Is Jessica your Daddy? "yes;" Where does Minnie Mouse live? [CM] gave her own address). I also observed that [CM] appeared to have memorized some expressive language that she did not fully understand (when asked the steps involved in washing her face, [CM] began "turn off water, get bathing suit. . ." and needed a prompt for "soap" before continuing with logical steps of rinsing, etc.). Since present level of performance is the foundation for development of IEP goals, the question of[CM's] current skill levels is problematic. . . . The evaluation report by Dr. Handleman (3/96) did not contain specific information about skill levels. Based on my observations, I question the representation by the UCLA consultant that almost all the proposed IEP objectives have been mastered.. . . A second comment on the [County's] draft IEP is that I think a major focus of [CM's] education should be on the development of independence. Like many students with autism, [CM] has learned to follow directions from adults. . . While [CM] can memorize and repeat fairly lengthy sequences of verbal dialogue, her functional use of language is much more limited. . . From my observation in the preschool, [CM] already feels comfortable with parallel play near other

> children, and she accepts social interactions initiated by familiar peers. . . . I [make] recommendations to increase the emphasis on independence, functional communication, and concepts underlying social interactions.

Respondent's Exhibit 58. Dr. Shea had other reasons for doubting the conclusions reached in Dr. Handleman's report. When she reviewed CM's records and notes from her preschool and therapy, there were reports of tantrums and screaming during the same time period that Dr. Handleman observed CM to be compliant. **Transcript, Vol. XVII1, 159-62.** In fact, notes from the Lovaas therapy show that in January 1996, CM was "still throwing tantrums quite a bit." **UCLA Book 7 (CM's Therapy Log Book), Bates No. 005641-42.** In the spring of 1996, her behavior was so bad that her Lovaas therapist reported that if something did not change, CM would be expelled from school **Transcript, Vol. XIV, 238.** And, in September and October 1996, CM was still having tantrums, biting and butting her head. **UCLA Book 7, Bates Nos. 005607, 005612, 005614.**

At the end of CM's preschool for 1996, her mother asked her teachers to respond to a questionnaire concerning her development. **Respondent's Exhibit 194.** A comparison of their responses to the opinion of the Michael Guiou shows that many of the items he felt were mastered had presented problems in preschool, especially communication skills. And, her preschool teachers' responses showed that most of CM's positive behavior followed prompting by her Lovaas therapist.

In addition to the assessment by Dr. Shea, Ms. Cook had Laurie McDanel, an exceptional children teacher, and Janna Beekman-Forst, a psychologist, visit with CM in May 1996. **Respondent's Exhibits 59, 59A.** They observed CM during a Lovaas therapy session. **Transcript, Vol. X, 169.** Although CM could respond to questions such as, "What would you do if.. .," she was unable to answer questions such

as, "What did you have for lunch?" ***Id.*** In between questions, she would engage in unintelligible speech. ***Id.*, at 170.** Her therapist told her a story and then asked CM to repeat it but she was unable to do so. ***Id.*, at 172.** She did not independently, or with prompting, engage in imaginative play. ***Id.*, at 173.** During the breaks which CM was given, she began to play and communicate but was halted and told to go back to work. ***Id.*, at 181.** This seemed self-defeating to Ms. McDanel, who teaches autistic children in the County system. From her observation of CM, the child was not enjoying herself. ***Id.*, at 184.** In her professional opinion, the Lovaas therapy

> was very intense. I thought that it seemed to ask her to provide lots of things from memory, wasn't eliciting anything spontaneous, but required her to rely upon her rote memory. I thought it was a lot of auditory directions that can be very overpowering to a child with autism and to some adults. I did not feel that what she was able to produce during that time was—that what she actually produced, I think, could have been done in less than two hours of time—that intense time of constantly going over the same things over and over. And I also thought that many times it was really unclear, because it was unclear to me, whether she actually got the answer right or not. It was either "pretty good" or they kept repeating the same question, and she kept answering the same answer. So I think that's confusing.

***Id.*, at 185.** Ms. McDanel also met with CM's mother after this session in order to obtain additional information for use in preparing an IEP. ***Id.*, at 186.** She was not told during

any of these meetings that there were behavioral problems with CM. ***Id.***

Dr. Shea felt that CM's current level of performance was not known and suggested the readministration of the Brigance test prior to formulating the IEP. **Transcript, Vol. IX, at 20-22.** The Plaintiffs did not agree to the administration of that test and determined to have private testing done prior to the IEP meeting. **Transcript, Vol. V, at 43-45.** They chose Dr. Thomas Boyle, a psychologist in New Jersey who in the past had worked with Dr. Lovaas. ***Id.*, at 48.** Dr. Boyle administered standardized testing but admitted in his report that the standard protocol had to be modified at times in order to allow CM to participate in the task. **Respondent's Exhibit 60.** Those modifications would have increased her ability to perform well, if they had any impact. **Transcript, Vol. XV, at 73.** He concluded that if she were placed in a full-day school, she would require 15 to 20 hours per week of one-on-one teaching focusing on her language deficits. ***Id.*** Initially, Dr. Boyle included CM's IQ scores in the report; however, her parents asked him to delete them. **Transcript, Vol. XV, at 21.** When Dr. Boyle prepares an evaluation for a school, it is his normal practice to report the IQ scores. ***Id.*, at 95.** CM's full scale IQ was *57* which is in the mildly mentally handicapped range. ***Id.*, at 94, 113.** Her language skills were very poor; and thus, he could not be sure she understood the questions being asked. ***Id.*, at 24.** He found she was able to respond to some things through rote memory but when a task required understanding the meaning of a sentence, she had difficulty. ***Id.*, at 27.**

Dr. Boyle was contacted again by the Plaintiffs in early 1997. They wanted him to evaluate CM a second time because they felt her true abilities were not shown in the July report and at the time, her medication was being changed. ***Id.*, at 57; Respondent's Exhibit 61.** CM's mother asked him to use different standardized tests than had been used in the July testing so that no one would think she had been trained on the test. **Transcript, Vol. XV, at 57.** In Dr.

Boyle's opinion, that was an unusual request because "no one has ever said that to me before. No one has ever expressed that someone might do that. But no one has ever requested a reevaluation that quickly either." ***Id.*** The Plaintiffs had a particular concern about CM's IQ scores. ***Id.*,** **at 119-20.** Dr. Boyle found that CM's IQ scores had increased but she still had significant deficits in expressive and receptive language skills. ***Id.*,** **at 58-59.** He did not alter his recommendation. Dr. Boyle was not told of any behavior problems with CM during either evaluation. ***Id.*,** **at 68.**

The Plaintiffs retained a third person to evaluate CM. Dr. Jan Blacher is an education professor in California who observed both CM and the County's autistic classrooms in August 1996. Dr. Blacher provided written observations to the Plaintiffs concerning the TEACCH classrooms which contained scathing criticisms of the teachers, the aides, and the program in general.[10] **Respondent's Exhibit 62.** Nonetheless, she testified that CM did not need 40 hours per week of Lovaas therapy and should be in a classroom setting part of the time. **Transcript, Vol. VIII, at 13.**

On August 14, 1996, the parties were finally able to have a meeting concerning CM's IEP for the 1996-97 school year. **Respondent's Exhibit 68.** The Plaintiffs felt the goals set for CM were very well done. ***Id.*** CM's mother expressed her desire that CM be placed in a classroom with "typically developing peers" for half the school day and 20 hours per week of one-on-one instruction. ***Id.*** Ms. McDanel stated she was concerned that CM might be unable to adjust and perform in a classroom of 20 children since she had never been with such a large group. ***Id.*** At the Plaintiffs' request the meeting was adjourned to a later date when CM's Lovaas consultant would be able to attend. ***Id.***

The second meeting occurred on September 13, 1996, and was attended by Michael Guiou, the Lovaas consultant.

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[10] Ms. McDanel, the teacher whom Dr. Blacher observed, strenuously contested the comments made.

Respondent's Exhibit 69. Also present was a kindergarten teacher from a regular kindergarten class since there was a possibility CM would be placed there. ***Id.*** The Plaintiffs acknowledged that the draft IEP was "a very good IEP" to which they had made minor changes after consulting with Mr. Guiou. ***Id.*** Of primary concern was the distinction between individualized instruction versus one-on-one instruction. ***Id.*** Ms. Cook explained the two terms could mean the same thing; but, primarily, individualized instruction is instruction designed to meet the unique needs of a child. ***Id.*** There would be no guarantee of one-on-one instruction for a certain period of time each week because the teacher is allowed to use the type of instruction necessary to teach the skill involved. ***Id.*** Although agreeing that the IEP goals were good, Mr. Guiou felt CM must have one-on-one instruction. ***Id.*** Ultimately, Plaintiffs explained that by one-on-one instruction they meant a "shadow," an aide or teacher, should be available throughout each day to assist CM. If she did not understand what the teacher was teaching, the shadow was to step in to assure CM would grasp the task. ***Id.*** Plaintiffs agreed that much of the time this person would not be needed; yet, they insisted such a person be available. ***Id.*** It was explained that in the County setting such a person was available but not exclusively for CM. ***Id.*** Because it was clear an agreement concerning placement could not be reached, the parties went through the IEP goals. ***Id.*** When a discussion of individualized versus one-on-one instruction resumed, it was clear that the difference lay in methodology. This meeting lasted for at least half of the day. **Transcript, Vol. IX, at 51.** During this and the prior meeting there was no mention that CM was experiencing any behavior problems. ***Id.*** This was important information because it should have been addressed in the IEP. ***Id.*, 52.** The next meeting was scheduled for September 23, 1996.

At that meeting, Ms. Cook presented significant revisions to the IEP based on the last meeting; and again, the

parties reviewed the IEP paragraph by paragraph, page by page. ***Id.*, at 54**. The parties, and their attorneys, reached an agreement on the goals. ***Id.*, at 55**. The IEP called for CM to receive a full-day program with half of each day in a regular kindergarten class accompanied at all times by an adult (shadow) to assist as needed, one-on-one instruction from Ms. McDanel, the special education teacher, in reading, math and written language for one and a half hours each day, guided instruction for one hour each day in the autism classroom and three hours of speech therapy each week. **Respondent's Exhibit 70.** The Plaintiffs responded that they did not want CM in the autistic classroom for any portion of the day because she might learn inappropriate behavior. ***Id.*** It was explained that while CM was there the other children in that classroom would either be doing their own "mainstreaming" or independent activities, thus reducing the possibility that CM would see inappropriate behavior and learn to imitate it. ***Id.*** The Plaintiffs did not agree and continued to insist on their choice of placement. In addition, they asked that the school system pay for the speech therapist to travel to CM's private school to provide therapy because EM, the mother, did not have the time to take CM to the therapist's private office. ***Id.*** It was explained that the school system could not send a therapist into a private school. ***Id.***

The IEP drafted for CM for the 1996-97 school year provided for CM to have "one-to-one instruction to learn new academic skills. She needs guided practice with an adult to maintain skills. She needs socialization and communication skills which can best be practiced with typically developing peers. Expanded language goals necessitate additional speech." **Respondent's Exhibit 10.** As a result, CM was offered a program providing her with five hours per week of guided instruction in the autism classroom, seven and one-half hours of one-on-one instruction, three hours of speech therapy and the remainder of her time in a regular kindergarten classroom accompanied

at all times by an adult. ***Id.*** The Plaintiffs did not accept the IEP because it did not provide the Lovaas methodology and would have placed CM in the autism classroom for a portion of each day. ***Id.*** Both parents testified that the only program they would have accepted was the Lovaas program. **Transcript, Vol. VI, at 110.** By that, they meant not only a Lovaas shadow with CM at all times, but also the use of discrete trial teaching. **Respondent's Exhibit 7.** And, they insisted that the shadow be the same person each day. **Transcript, Vol. VI, at 115.** Moreover, the Plaintiffs did not approve of the method described by Ms. McDanel for dealing with tantrums which occur in the regular classroom because a child having tantrums would be returned to the TEACCH classroom. **Transcript, Vol. VI, at 108.**

For the 1996-97 school year, CM was placed in the K-2[1] class at the Covenant Academy, a private religious school with six children in the class: four kindergartners, a first-grader and a second-grader. **Transcript. Vol. XIV, at 178-79.** CM's shadow for the school year was Caroline Dilworth, who had been her Lovaas therapist the prior year. Dilworth, who has a college degree in psychology, began working with CM two months after graduation and without any background in working with autistic children. ***Id.,* at 198.** Despite the low student ratio, CM's kindergarten teacher, Ms. Salter, did not have a very organized curriculum and was not thought to be a good teacher by Ms. Dilworth. ***Id.*** Salter was replaced in February 1997. ***Id.***

In the fall of 1996, CM's mother recorded in her logs that CM had forgotten much of what she had learned, had become lazy and still had not obtained spontaneous language. ***Id.,* at 203, 205.** Ms. Dilworth, who accompanied CM to school each day, reported in October that CM was not responding to her name or to naturalized statements appropriately. ***Id.,* at 288.** She required much prompting to

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[1] A class encompassing children from kindergarten through the second grade.

participate in class. *Id.* At the end of October, Ms. Dilworth reported: "Many times prompted today. One time, no prompt. Note: This is an area of growing concern. At times her peers yell her name two or three times before she will or not look their way." *Id.*, at 289. And, CM did not listen when her teacher read stories, although she did do so when Ms. Dilworth read the story. *Id.*, at 292. Ms. Dilworth readily admitted that "it could have been because she has been working with me for two years. . . ." *Id.* All through the spring of 1997, CM required frequent prompting. *Id.*, at 208-12. Although present in the classroom as CM's Lovaas shadow, Ms. Dilworth also worked with other children and not exclusively with CM. *Id.*, at 294.

CM continued to have behavior problems in 1996. *Id.*, at 220, 256-63. In fact, during the first months after CM began Covenant Academy, she had significant problems with tantrums. *Id.*, at 263-66. She had tantrums on an almost daily basis, many of which were witnessed by her peers, resulting in problems in her socialization. *Id.* On one occasion, she had a tantrum while the teacher was out of the room. Ms. Dilworth, who had been left alone with the classroom, could not remove CM from the room and thus, her classmates witnessed a ten minute tantrum. *Id.*, at 266. This occurred on the same day that Michael Guiou, CM's Lovaas consultant, met with the school officials concerning her IEP; yet, no mention was made to them of these problems. *Id.* This type of behavior continued throughout the fall despite various methods of dealing with them by her therapists. *Id.*, at 267-76. In fact, new behavior problems appeared in October and November of 1996: biting and hair pulling. *Id.*, at 277. In January 1997, CM's tantrums at home were averaging eleven minutes in length and included biting, hair-pulling, screaming and kicking. *Id.*, at 279. And, in mid-January 1997 she had two tantrums at school. *Id.*, at 283. In fact, Ms. Dilworth reported in early 1997 that it was necessary to remove CM from the classroom in order to work with her on academic work. *Id.*, at 285.

B. The methodologies at issue.

The Lovaas methodology was developed by Dr. Ivar Lovaas as a result of a three year study conducted of 19 children who were diagnosed as autistic. **Petitioner's Exhibit 14, "Behavioral Treatment of Autistic Children".** All of the children were aged three or under and received 40 hours per week of one-on-one instruction in their home. ***Id.*** At the end of the study, nine of the children had achieved normal JQ's and were described as indistinguishable from their peers. Eight were placed in aphasic (communication handicapped) classes and the remaining two were in autism or special education classes. ***Id.***

Dr. Jacqueline Wynn is the director of the Lovaas Institute and testified as an expert in the use of Lovaas therapy to treat autistic children.[12] Lovaas therapy is one version of Applied Behavioral Analysis (ABA) which "consists of breaking down activities into discrete individual tasks and rewarding the child's accomplishment. The child eventually learns to integrate the information and associate instruction with a given activity." ***Mr. X v. New York State Educ .Dept.*, 975 F. Supp. 546, 548 n.1 (S.D.N.Y. 1997); Transcript, Vol. XIII, at 71.** Discrete trial teaching is one aspect of the program and involves a prompt to the child followed rapidly with a consequence based on whether the child gives the appropriate response. ***Id.; T.H., supra.*** In the Lovaas program, when a child has negative behavior, the therapist analyzes why and in what context it is happening. **Transcript, Vol. XIII, at 27-28.** This allows the therapist to determine the reason behind the behavior, such as seeking attention, and to predict when it will occur. ***Id.*** Then, the therapist devises an intervention plan, a plan to stop the behavior. ***Id.*, at 29.** For example, if the behavior is occurring because the child is frustrated by a task, it may be that the

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12 She was not accepted as an expert in the disease of autism.

task is too difficult and therefore, needs to be broken down. ***Id.*, at 30.** "[M]any of the original Lovaas techniques are no longer considered appropriate, e.g. using electroshock as an adverse consequence." ***T.H.*, 55 F.Supp.2d at 836 n.8.** Another technique originally used was hitting the child if he or she engaged in self-stimulatory behavior. **Transcript, Vol. XIII, at 206-07.**

The Lovaas program designs a treatment package for the child which begins with 40 hours per week of one-on-one instruction in the child's home. ***Id.*, at 45.** Later, more and more of the time is spent in a socialization setting of school, peer play and community activities. ***Id.*** An essential component of the program is the involvement of the parents in the therapy so that any gains made by the child with his therapist are not lost. ***Id.*, at 45-46.** The parent is expected to help the child generalize the skills learned during therapy to the everyday world. ***Id.*, at 75.** According to Dr. Wynn, a major difference between Lovaas therapy and other treatments for autistic children is that intervention in the Lovaas program begins at the preschool versus school age. ***Id.*,at 49.**

The program also uses a therapy log which provides continuity among the therapists and aides involved. ***Id.*, at 96.** It is used to record behavior, skills and problem areas. ***Id.*** It becomes a record of what a child knows and does not know. ***Id.*** The program has an hierarchy of goals in different categories which are to be mastered. ***Id.*, at 160.** Once a skill is mastered, the child is moved on to a new one. ***Id.*, at 102.** If he or she regresses, the therapist goes back to the last skill. ***Id.*, at 105.** The ultimate goal is for the child to generalize the skills learned in therapy. ***Id.*, at 103.** Thus, drills are used to teach the children. For example, the receptive label drill is designed to make sure the child understands the name of an object, rather than repeating it from rote memory. ***Id.*, at 32.** This is done to ensure that the child relies on auditory versus visual skills in processing language. ***Id.*, at 33.** The Lovaas program relies on prompts to ensure that the child acquires a

skill and remains successful with it. ***Id.*, at 12 1-22.** "But the goal is to start with the prompt and then fade out the prompt and get rid of it so the child is working independently." ***Id.*, at 122.** Successes are reinforced, usually by physical contact or food. ***Id.*, at 37.** Eighty percent of the Lovaas program focuses on the development of language skills. ***Id.*, at 110.** Typically, the program begins around age three and continues until seven or eight. ***Id.*, at 135.** On cross-examination, Dr. Wynn testified that the TEACCH program also begins at preschool age and relies on heavy parental involvement. ***Id.*, at 181.**

Dr. Lee Marcus is the clinical director of the TEACCH Center in Chapel Hill, North Carolina. **Transcript, Vol. XIX, at 6.** The TEACCH program creates a classroom environment for autistic children which is predictable and therefore understandable. ***Id.*, at 76.** Structure is very important to autistic children because they cannot handle numerous stimuli at once. ***Id.***

The physical space of their classroom is arranged in a manner that explains to the child what will happen in different parts of the learning program. ***Id.*, at 77.** Thus, the autistic child, who has strong visual skills, is able to rely on those skills to feel comfortable with the setting. ***Id.*, at 78.** The program also relies on structure in the form of a daily schedule because autistic children have difficulty understanding the concept of time. ***Id.*, at 79.** The daily schedule is presented to the child according to each child's abilities. **Id., 80.** Thus, some may be written and others may rely on color cues. But the purpose of the schedule is to allow the child to know in detail what will occur at each portion of the day. ***Id.*, at 81.** This is done because autistic children do not understand the concept of sequencing and become very anxious about what will occur next in their day. ***Id.*, at 82.** Each child has an individual work system which is designed to help the child become independent in carrying out his assignments. ***Id.*, at 83.** Within this work system are four questions for each child to integrate during his

assignment: What am I supposed to do?; How long will the work last?; How do I know when I am finished?; and What comes next? *Id.*, at 84. The program uses visual cues as well as teacher directives. This increases independence and reduces frustration caused by an inability to understand auditory directives. *Id.*, at 89. Like Lovaas therapy, TEACCH allows the child to learn one task which has been broken into its simplest parts before going on to a more difficult task. *Id.*, at 98.

Another aspect of the program involves teaching language and communication skills because "[w]hat distinguishes children with autism from other language handicapped people is not so much the words, although a lot of kids have great difficulty learning words, it's using those words in a social context to communicate naturally, spontaneously, and meaningfully." *Id.*, at 106. This requires having the child learn and understand that communication involves two or more people since autistic children are self-contained. *Id.* The first goal is to get communication going in any form as long as there is a connection between the child and the teacher or peers. *Id.*, at 109. This requires an assessment of the child's current skills in order to know how to elicit spontaneous communication. *Id.*, at 111. Usually this is done by involving the child in an activity which interests him, such as a picture exchange in which the child names the object. *Id.*, at 112-13. Dr. Marcus admitted that the TEACCH program is not the only manner in which autistic children may learn but noted that many of the same features of this program are used in others. *Id.*, at 120.

The TEACCH method does not use behavior modification to deal with behavior problems because that method is a consequential approach. *Id.*, at 121. Instead, it uses behavior management which means that, based on the child's individual needs, the environment is structured to prevent problems. *Id.* If the child, despite these measures, is exhibiting aggressive or self-injurious behavior, a new assessment is done. *Id.*, at 122. It may be that too much is

being expected of the child or it may be necessary to use a consequential approach in close proximity to the behavior. ***Id.*** Many behavior problems in autistic children, as with normal children, are alternative forms of communication. ***Id.*, at 123.** They are signs of stress or frustration. ***Id.*** For example, rather than placing a child in a 'time out" each time he kicks, he will be rewarded each time he does not kick. ***Id.*, at 124.** But at the root of the solution will be a determination of why the behavior occurs. ***Id.*, at 125.** Only in this manner can the need for the behavior be eliminated rather than simply suppressing the behavior itself. ***Id.*** Tantrums may occur because the child is frustrated at a task, the task has been going on too long, or it is too difficult. ***Id.*, at 125-30.** Although some people call it a form of task avoidance, one must understand why the child wants to avoid the task in order to understand the cause of the behavior. ***Id.***

Dr. Marcus feels that TEACCH differs from Lovaas philosophically, strategically and in the manner in which success is measured. ***Id.*, at 139.** The Lovaas methodology views autism as a collection of aberrant behaviors which may be controlled by an intensive behavior/discrete trial teaching approach. ***Id.*, at 140.** TEACCH views each autistic child as having individual differences. ***Id.*, at 142.** "[W]hile you can improve on them and help and move people along in some cases to the point that they might be indistinguishable from normal, [TEACCH] doesn't really [] accept the notion that everything is fixable and that autism is merely a collection of unusual behavior or behaviors and deficits." ***Id.*** Moreover, TEACCH provides a predictable environment to enable the child to become independent by learning. ***Id.*, at 145.** The Lovaas approach uses the "one-to-one adult-initiated process and because of what autism is, and the fact that people with autism are potentially prompt dependent that what happens is that the person with autism becomes dependent on the adult who is doing the teaching." ***Id.*** They become dependent on verbal cues rather than

learning to integrate cues by using their visual skills. ***Id.*** Lovaas also has a predesigned curriculum which is imposed on the child, rather than a curriculum designed for that specific child. ***Id.*, at 147.** However, TEACCH uses developmental psychology to ensure that the child "crawls before he walks" rather than teaching the child to walk when he does not understand the concept of crawling. ***Id.*, at 151.** Another difference between the two programs is the use in the Lovaas program of high school and college graduates as the therapists after they have been trained at the Lovaas Institute. ***Id.*, at 154.** "This is a very complex disorder, and people who are engaged in a clinical enterprise or an educational enterprise need to have good—they need to have a lot of knowledge in a lot of areas. And even then--even with that, you need specialized training and ongoing support." ***Id.*** It is also important that the learning occur in the classroom, as opposed to the child's home, because "[l]earning must go on in the context in which it can be generalized." ***Id.*, at 158.** One-on-one instruction is used in the TEACCH classroom but not to the exclusion of other methods of instruction. Many parents become concerned that their child will develop inappropriate behavior from the other children in the class. ***Id.*, at 179.** However, autistic children have difficulty imitating behavior; therefore, if the child is at such a level of development that she is capable of imitation, there are other methods of working with her to avoid the problem. ***Id.*, at 180.**

C. The program offered by the County.

The 1996-97 JEP would have placed CM, who was almost seven years old, in Ms. McDanel's classroom for autistic children at the Bruce Drysdale Elementary School. At that time, she had five students in her classroom, one girl and four boys ranging in age from six to eleven years. **Transcript, Vol. X, at 18.** Another child who is in a regular second grade classroom receives instruction from her

one hour each day. *Id.* A third student who was taught by Ms. McDanel in two previous years is in a regular fifth grade classroom and goes to visit one hour each week as a reward. *Id.* One day each week, two fourth graders from a regular classroom come into her classroom as a means of reverse mainstreaming in order to teach socialization skills. *Id.*, at 19.

One of the students in her classroom goes to the library each morning where he uses the computer because he is learning to write sentences. *Id.*, at 42-43. Another student begins his day by doing independent work because it helps him settle into the routine. *Id.*, at 44. A third student is in the play area and a fourth is also doing independent work. *Id.*, at 45. Data is kept on each child and when the teacher and aides rotate, they discuss each child's accomplishments and goals. *Id.*, at 50. If a child's IEP requires it, a daily anecdotal log is kept and each child who is mainstreamed into a regular classroom has a daily log. *Id.*, at 54. Each child receives one-on-one instruction with Ms. McDanel each day. *Id.*, at 59. While the students work independently, they are monitored by an aide. *Id.*, at 64. Each morning the children have time on the playground. *Id.*, at 69.

Ms. McDanel feels the environment of the room is important because autistic children are easily distracted. *Id.*, at 150. In addition to independent work time and one-on-one instruction, there are times allotted for communication and social skills development. *Id.* She finds an area of interest to each child and then begins to build a personal relationship with him based on that interest. *Id.*, at 151. This teaches them to communicate. *Id.* By having the classroom environment comforting to the children, they are able to adjust to the changes in their daily schedule, making the transition between tasks and different times of the day. *Id.* This allows them to transfer these skills beyond the classroom. *Id.*, at 152. Also, it frees them from fear and confusion and allows them to learn. *Id.*, at 152-53. Each

week in the play area, they introduce different scenes, such as camping sites, to promote interest in the children. ***Id.*, at 155.** This encourages spontaneous communication. ***Id.*** If CM had come into the class, a third teacher's aid would have been hired. ***Id.*, at 28, 115.**

Ms. McDanel testified that tantrums are the beginning level of communication for autistic children and as soon as they have a system to communicate, the tantrums decrease. ***Id.*, at 194.** They are allowed to use pictures or other methods to communicate their needs and then the behavior usually ceases. ***Id.*** "I rarely have anybody tantrumming, because academically, they're learning." ***Id.*** Tantrums are a sign, not that the child is lazy, but that he or she is sick, hungry, tired, or frustrated. ***Id.*, at 195.** She has never had a child functioning well enough to be mainstreamed into a regular classroom who also is having tantrums. ***Id.***

Ms. McDanel viewed a video of CM functioning in October 1996 in her private preschool. ***Id.*, at 191.** Based on her observations, the child was not functioning as independently as had been reported and she relied on her therapist for prompting. ***Id.*, at 192.** CM was not functioning as well as any child in Ms. McDanel's classroom in areas such as learning the day of the week, knowing what was going on during the day and interacting with others. ***Id.*** She was unable to sit in a small group or work on something without prompting. ***Id.*** During calendar time, she required constant prompting to refocus and she did not respond to other children even when they approached her. ***Id.***

Ms. McDanel was asked several questions about Dr. Blacher's reported observations of her classroom. Although Dr. Blacher reported several students engaged in self-

stimulatory behavior, Ms. McDanel testified that only one student, who was absent that day, engages in such behavior. ***Id.*, at 213.** One student who was described as having been removed from the room due to behavior problems was actually doing an independent work project outside the class at the time. ***Id.*, at 214.** Dr. Blacher reported that no one checked or monitored the students doing independent work; a description with which Ms. McDanel disagreed. ***Id.*** Although Ms. McDanel had invited questions from the doctor concerning the observation, she had none. ***Id.*, at 216.**

Ms. McDanel explained the progress she has seen in her current students. T began in her classroom when he was five years old and at the time was very confused, had tantrums, and could not focus. **Transcript, Vol. X, at 152-53.** She began by using pictures to show him what would happen during each portion of the day. ***Id.*** When he first came into the class, he had almost no language skills. ***Id.*** After working with him, he began to answer "yes" and "no" to questions and then expanded his answers. ***Id.*, at 154.** The second year in her classroom, he began to have spontaneous communication. ***Id.*** "He's able to answer anything. He's able to participate in a group setting in a first grade classroom of 1 8 kids and listen and answer questions." ***Id.*** He understands the questions and gives appropriate answers, not as a result of having practiced with her, but as a result of conceptualizing the language. ***Id.*** T has learned to generalize and in his second year with Ms. McDanel is mainstreamed into the first grade classroom. ***Id.*, at 35, 37.**

M first began with Ms. McDanel in the 1996 school year and at the time was nonverbal. ***Id.*, at 29.** She did not understand the routine of the classroom but picture schedules were designed for her. ***Id.*** She is now able to express her wants and needs and for the first time is **able to** carry on conversations. ***Id.*** She is also able to follow the classroom schedule. ***Id.***

B was originally labeled as learning disabled. ***Id.*, at 158.** He was evaluated at TEACCH and found to be autistic. ***Id.*, at 159.** He came into Ms. McDanel's classroom the previous year when he should have been in the fourth grade. ***Id.*** In March of that year, he began to move into a regular fourth grade classroom and this year, is in a regular fifth grade classroom. ***Id.*** Ms. McDanel feels that having a structured classroom allowed him to learn and become comfortable with oral instructions. ***Id.*** As a reward for his behavior in the regular classroom, he comes back to visit once each week for one hour. ***Id.***

S is academically at his grade level but he remains in Ms. McDanel's classroom because he easily becomes distracted. ***Id.*, at 45-46.** Because of his level of anxiety, he performs well in the structured classroom but would have trouble coping in a regular classroom. ***Id.*, at 46-47.** However, he has made great progress because at first he had difficulty in the structured classroom. ***Id.***

IV. CONCLUSIONS OF LAW

ALJ Phipps found that "[a]t its core, the dispute between the parties is a debate over a choice of educational methodology for the teaching of autistic children." **Final Decision, filed December 11, 1997.** She found the County had complied with all procedural and substantive matters required by the IDEA and had offered CM a FAPE. She also found that in order for CM to receive maximum educational benefits, her one-on-one aide should be trained in the Lovaas method of using discrete trial teaching to assist in the transition to the regular classroom. Her findings were affirmed by the SRO. **Decision, March 3, 1998.**

At oral argument, Plaintiffs' counsel said the issue for resolution in this case is whether the County is obligated to reimburse the Plaintiffs because they did not adopt the Lovaas program for CM. Plaintiffs' trial brief is a recitation of the superiority of the Lovaas program over the TEACCH

method. "This ease provides the opportunity to address issues related to CM and simultaneously resolve a number of global special education issues that are of concern to the Defendant and the State of North Carolina." **Plaintiffs' Trial Brief, filed August 12, 1999, at 8.** At the heart of Plaintiffs' contentions is a belief that CM was denied the Lovaas program because it would have been too expensive. That, however, is not the issue at hand.[13]the truth? **Plaintiffs' Trial Brief at 7, 11, 14.** Plaintiffs raise only three legal arguments: the County failed to comply with the procedural requirements of the IDEA because the ALJ and SRO issued their opinions beyond the time requirements; the IEP is vague and ambiguous; and the Plaintiffs are entitled to reimbursement for an aide trained in Lovaas therapy who would have accompanied CM had she been in the regular kindergarten class for the 1996-97 school year.

Federal regulations require that within *45* days after receipt of a request for a due process hearing, the state agency must provide the hearing and issue a final decision. **34 C.F.R. § 300.512(a).** When a request for a review of that decision is made, the SRO shall issue the decision within 30 days. **34 C.F.R. § 300.512(b).** Extensions of time may be granted by the hearing or review officer on the request of either party. **34 C.F.R. § 300.512(c).**

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[13] The trial brief raises such issues as: the County did not initiate the Lovaas program because then it would have had to provide it to other children; "Maybe in this case we are confronted with the belief that this problem should not fall on the school districts at all;" how should funding be provided for Lovaas program; will the Court have the integrity to "serve its function of independently reviewing the case from a global perspective: since it "has already shown its ability to provide accolades for the TEACCH program;" this case should be the impetus for new legislation to support Lovaas in the state schools; the TEACCH program results in a lifetime of disability; a decision in favor of CM will motive school districts to lobby the legislature to provide Lovaas programming; "How many lives need to be ruined while we deny the truth? **Plaintiffs' Trial Brief at 7, 11, 14.**

On September 23, 1996, Plaintiffs were on notice that the County's proposed IEP did not meet their requirements. They argue, however, that had ALJ Phipps' decision been timely rendered within 30 days after the conclusion of the hearing in April 1997, CM would have been able to take advantage of a public school education for the 1997-98 school year. The same argument is made concerning SRO Walters' decision. This position is based on the premise that the Plaintiffs would have accepted the IEP as proposed with the implementation of Judge Phipps' suggestion that the aide to accompany CM in the regular classroom would be trained in the Lovaas methodology.

First, the undersigned is unable to conclude from the record that the decisions were in fact issued in an untimely manner because the proceedings were extended by the conduct of both parties. On November 1, 1996, Plaintiffs filed a petition for a contested hearing pursuant to the North Carolina Administrative Procedures Act, N.C. Gen. Stat. §§ 150B-1, *et. seq.*[14] **Petition, included in Official Record.** On that same date, Plaintiffs moved to consolidate findings by Judge Mann with this petition and on November 14, 1996, that request was granted and the matter was continued. **Order for Consolidation, filed November 14, 1996.** A consent order was filed on December 2, 1996, which set the hearing for March 3, 1997. **Response to Respondent's Motion to Continue, filed February 21, 1997.** On February 14, 1997, the County moved for partial summary judgment which was granted on March 24, 1997. **Order Granting Partial Summary Judgment, filed March 24, 1997.** Plaintiffs moved for reconsideration and sanctions. **Motions, filed March 11, 1997.** In February 1997, the County moved for a continuance of the hearing which was granted and the hearing was scheduled to begin on March 17,

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[14] The state act provides for different mechanisms and time periods than the federal regulations. Because the undersigned finds the Plaintiffs have not been prejudiced in any event, the issue of waiver is not address.

1997. **Scheduling Order, filed March 14, 1997.** The hearings began on March 17 and concluded on April 16, 1997. Thus, any argument by Plaintiffs that the hearing did not occur in a timely manner is defeated by the extensions of time given both by consent and on motion.

The transcripts from the lengthy hearing were not completed until July 30, 1997. **Order, filed July 30, 1997.** The parties were given, in accordance with the North Carolina Administrative Procedures Act, until September 19, 1997, to submit proposed findings of fact and conclusions of law. ***Id.;* N.C. Cen. Stat. § 150B-36.** On November 19, 1997, Judge Phipps notified the parties she had reached a decision and requested the County's attorneys to submit revised findings of fact and conclusions of law. **Letter dated November 19, 1997 from Judge Pbipps to counsel.** The decision then issued on December 11, 1997.

Plaintiffs filed a request for review which was received in the office of the State Superintendent of Public Schools on December 20, 1997. **Letter from F. Lowell Harris to Dr. Joe D. Walters, dated January 12, 1998.** Dr. Joe Walters was appointed SRO on January 12, 1998. ***Id.*** On January 26, 1998, Dr. Walters notified the parties that the transcripts and records of the proceedings below had not yet been received and therefore, "without waiting for a request from either of the parties, the Review Officer hereby extends the time for completion of the review." **Request for Written Arguments and Extension of Time, dated January 26, 1998.** Written arguments were to be filed on or before February 19, 1998. ***Id.*** Within 30 days of the submission of those arguments, the SRO issued his decision. **Decision, filed March 3, 1998.**

Assuming *arguendo* that the decisions were not issued in compliance with the federal regulations, the undersigned concludes the Plaintiffs are not entitled to relief. The Fourth Circuit has

> previously held that the failure to comply with IDEA's procedural requirements, such as the notice provision, can be a sufficient basis for holding that a government entity has failed to provide a free appropriate public education. However, to the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education.

***Gadsby by Gadsby v. Grastnick*, 109 F.3d 940, 956 (4th Cir. 1997) (citing *Hall by Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985)).** Plaintiffs' contention is that if the decisions had issued earlier, "the inability to resolve the key issue of the aide should have precluded the break down that resulted in CM being unable to attend Defendant's school for the 1997/98 and subsequent school years." **Trial Brief, at 16.** However, the Plaintiffs admitted that the only program they would have accepted was the Lovaas program and that is not what the IEP provided. Contrary to the assertion in the brief, this was not the only reason the Plaintiffs rejected the IEP. They were adamant that CM should not spend any portion of the day in the autistic classroom. They did not agree that if CM was experiencing tantrums in the regular classroom she should be returned to the TEACCH classroom until she had progressed sufficiently to handle the distraction of the regular class. And, they insisted that CM be instructed only by use of the discrete trial teaching method to the exclusion of TEACCH methods and receive such instruction 15 to 20 hours per week. Moreover, they insisted that her shadow in the regular classroom be the same person all the time which was contrary to the IEP's goal of having CM become less dependent on one person. Thus, whether they had known

that ALJ Phipps would have recommended a Lovaas trained aide to be with CM while she was in the regular classroom is of no moment. They rejected not simply the lack of a Lovaas shadow but the fact that Ms. McDanel would have used TEACCH methods in a TEACCH classroom with one-on-one instruction which would occur for fewer hours per week than the Plaintiffs wanted.

Thus, even if there were procedural violations, they did not actually interfere with CM's receiving a FAPE education. ***Gadsby, supra.***

Plaintiffs argue the 1996-97 IEP was so vague and ambiguous that it violated IDEA's procedural requirements for the development of an educational plan. They claim it is impossible to ascertain where within the school the services would be provided, whether CM would be placed in a kindergarten or first grade class, who would be providing the services and at what times and places.

IDEA provides that an IEP means a written statement for the child developed at a meeting with the school officials and the parents which shall include a statement of the child's present levels of educational performance, a statement of annual goals and "a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs." **20 U.S.C. § 1401(a)(20).** Here, the IEP specified that CM would receive 12.5 hours per week of one-on-one and guided instruction with 3 hours of speech services occurring in the TEACCH classroom. **Respondent's Exhibit 10, at 1, 2, 5.** It specified that she would be in a regular kindergarten class for library, music, art, lunch, assemblies, physical education, recess, centers, circles, free play and snack accompanied at all times by a teacher or aide and set forth the percentage of the time to be spent there. ***Id.*, at 2.** It was signed by both the TEACCH teacher, Ms. McDanel, and the kindergarten teacher, Michele Alexander. ***Id., at* 5.** Throughout the discussion of goals for CM references are made to instruction in the regular

classroom versus the TEACCH classroom. Moreover, during the meeting with the Plaintiffs on September 23, 1996, these matters were fully discussed and explained. ***Brett* K, *supra*, at **10-11 (quoting *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993) (IDEA requires "an adequate, rather than an optimal, IEP" and noting parents' agreement at IEP development meeting that the goals were appropriate)); *Doe by and through Doe* v. *Defendant I*, 898 F.2d 1186, 1190-91 (6th Cir. 1990) (where the information claimed to be absent from the IEP was known to all parties, technical violation harmless); *J.S.K. by and through J.K. v. Iiendry County Sc/a. Rd.*, 941 F.2d 1563, 1571 (11th Cir. 1991) (argument that IEP failed to include teacher's day-to-day activities and thus, ambiguous, rejected).**

Plaintiffs' final contention is that they prevailed below because the ALJ and SRO determined that CM should be accompanied by a Lovaas trained aide while she was in the regular kindergarten class. As a result, they seek reimbursement for the cost of having their Lovaas therapist available to CM in her private school during the 1996-97 school year. However, reimbursement would be proper only if the County failed to offer CM a FAPE. ***Burlington v. Dept. of Educ.*, 471 U.S. 359, 372-74 (1985); *Sellers*, 141 F.3d at 526.** Thus, the issue is not whether the Plaintiffs prevailed, but whether the 1996-97 IEP as offered would have provided a FAPE.[15]

It is first noted that both theALJand SRO found the IEP as drafted was appropriate.

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[15] The Court concludes that by raising this argument Plaintiffs have conceded that the IEP as modified by the use of a Lovaas trained aide would have provided a FAPE.

> [T]he IDFA[] recogni[zcs] that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment. Rather it establishes a "basic floor of opportunity" for every handicapped child. States must provide specialized instruction and related services "sufficient to confer some educational benefit upon the handicapped child," but the **Act does not require "the furnishing** of every special service necessary to maximize each handicapped child's potential."

***Hartmann*, 118 F.3d at 1001 (quoting *Rowley*, 458 U.S. at 199, 201).**

ALJ Phipps ruled that the proposed IEP for the 1996-97 school year "was appropriate, however, in order for the IEP to provide the maximum educational benefit to her" the aide should be trained in the Lovaas method. **Decision, *supra.*** This went beyond what was required under the statute. Nonetheless, the educational placement must be "likely to produce progress, not regression or trivial educational advance." ***Hall by Hall*, 774 F.2d at 636.**

The sequence of events occurring from the fall of 1995 through the spring of 1997 show that the County offered a FAPE. In fact, it may well be that the education offered by the County would have benefitted CM far more than continued Lovaas therapy. Contrary to the Plaintiffs' contention that placement of CM in the TEACCH classroom would have caused her to regress, CM's behavior regressed from 1995 through 1997 while she was in Lovaas therapy. And, in the fall of 1996 she exhibited negative behaviors not previously shown, *i.e.*, biting and hair-pulling.

In the spring of 1996, Ms. Dilworth reported to CM's mother they were in danger of being expelled from school because of CM's behavior. Yet, Plaintiffs failed to disclose this regression to any expert or to the County.

The County's experts and teachers noted the intensity of concentration of the Lovaas program on behavior modification and rote learning to the exclusion of developing spontaneous language skills. Ms. McDanel noted that when CM began to play and use spontaneous language during breaks, she was pulled back into therapy. She described CM as a child who was not enjoying herself. The Plaintiffs' experts admitted that at this point, CM no longer needed 40 hours per week of Lovaas therapy. Dr. Blacher said 40 hours was too much; CM should be in a classroom setting. Dr. Boyle recommended between 15 and 20 hours per week of one-on-one instruction, not specifying Lovaas therapy. Ms. Dilworth admitted that CM had become dependent on her and in the spring of 1997 had to be prompted repeatedly.

All of the experts testified that autistic children engage in inappropriate behavior as a means of communicating that something is wrong; *i.e.*, the child is tired, frustrated, sick, hungry, or having too much expected of her. CM's mother described her in the fall of 1996 as having become lazy and having forgotten what she had learned. During the same time, CM's behavior deteriorated. Ms. McDanel testified that autistic children do not engage in behavior problems because they are lazy but because something is wrong which they are unable to communicate. The behavior itself is the beginning of communication and the teacher must use pictures to help the child express herself. As soon as the child is able to communicate, the behavior improves. Yet three years into the program, CM's parents continued to enforce the Lovaas therapy which focused on behavior modification or "extinction" despite the fact that CM's behavior was regressing. What the Court is compelled to note is that by 1997 when she was seven years old, CM had been literally working approximately 40 hours

per week since the age of three without any time to simply be a child. Her behavior regression is therefore, according to the experts, not surprising.

Plaintiffs strenuously objected to CM having any time in the autistic classroom out of fear she might learn inappropriate behavior. This argument is disingenuous in view of CM's deteriorating behavior during the same time frame. Moreover, it was to her detriment. Ms. Dilworth testified to numerous occasions when CM's classmates in the private school witnessed her tantrums, to the point that it impacted her socialization. On one occasion, CM tantrummed for ten minutes in front of her peers. The damage done to her self-image and ability to socialize by these incidents seems far greater than any experience she would have had in Ms. McDanel's classroom. In addition, the Plaintiffs felt it essential that CM have an aide available to her at all times. This was a primary reason for rejecting the IEP because there was no guarantee that the same person would always be in the regular classroom with CM. Yet, Ms. Dilworth testified that she worked with other children at CM's private school. Indeed, the reason CM's classmates witnessed one of her tantrums was because Ms. Dilworth had been left in charge of the class and therefore could not leave to remove CM.

The County's teachers and experts testified that, first and foremost, autistic children need a structured environment in which they feel secure before learning is imposed on them. And, once this is accomplished, independence is the ultimate goal so that the child can function in the real world. The IEP was designed to give CM the opportunity to do both: she would be in the structured classroom or a room adjacent thereto for academic one-on-one instruction and she would have time in a regular classroom with an aide for socialization and communication skills.

Ms. Dilworth testified that by the spring of 1997, CM had to be removed from her private school classroom for any academic work to be accomplished. CM would not listen to

stories read by her teacher; but when Ms. Dilworth read them, CM could answer questions. By all accounts, CM was not becoming independent but rather more dependent on her therapist.

Moreover, Dr. Boyle's testing in February 1997 showed that CM was not making the dramatic progress that her parents reported. Although her IQ scores increased some, her language and communication skills had not improved significantly and she still was unable to generalize that which she had learned. Dr. Boyle reported CM as having significant expressive and receptive language skills. He reported her as mildly retarded and depending on rote memorization rather than generalizing learning.

These findings corroborated those of the County's experts and teachers. Consistently, the school authorities could not find objective evidence of the progress which the Plaintiffs claimed on CM's behalf. The skills reported to have been mastered were not recognized by her private preschool teachers, individuals who had absolutely no stake in the litigation. And, the reports of Dr. Shea, Ms. Forst, and Ms. McDanel echoed Dr. Boyle's conclusion that CM remained unable to generalize the skills learned in therapy beyond that setting.

Yet while CM remained at Covenant Academy with a teacher her therapist described as below average, Ms. McDanel's children made progress in the TEACCH classroom. M went from being completely nonverbal to having the ability to express her needs and wants. T was mainstreamed into the first grade and receiving one-on-one instruction. B had gone in less than a year from the TEACCH classroom into a regular classroom.

Of course, there is no evidence that CM would have prospered in the TEACCH setting because she has yet to be exposed to it. However, it is clear that the Plaintiffs have, understandably, acted with some sense of desperation in connection with their child's condition. After three months in the TEACCH program in 1993, they removed CM for the

Lovaas therapy, a program described as achieving recovery before kindergarten. When CM was placed in a private preschool, no one was told she was autistic. Dr. Boyle was instructed to remove her IQ from his evaluation for the school. And, the Plaintiffs never told anyone evaluating CM that she was experiencing behavior problems. Nonetheless, the County did everything within reasonable limits to accommodate the Plaintiffs' desires for their child's education. In 1994, they offered to provide services in CM's private preschool. They provided speech services throughout free of charge. The Plaintiffs were reimbursed the sum of $1,200 in connection with Dr. Handleman's evaluation, a report which ultimately was useless. The County allowed the Plaintiffs to use Dr. Boyle's services instead of having certain tests readministered by the school authorities. Finally, in the third meeting for the 1996-97 school year, the County basically offered the Plaintiffs everything they had requested: CM would go into a regular classroom despite Ms. McDanel's misgiving that she could handle the size of the class. She would receive one-on-one and guided instruction for a total of ***12.5*** hours per week, a figure close to the 15 hours suggested by Dr. Boyle. Her speech services would be increased. And, an aide would accompany CM at all times while she was in the kindergarten class.

"The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education. . . . " ***Lenn*, 998 F.2d at 1086.** "The IDEA does not require, however, that a school system fund the best possible placement for a child. 'The [IDEA] requires only that the child be able to benefit from the instruction that [she] receives, not that [she] be able to maximize [her] potential commensurate with the opportunity provided nonhandicapped children.'" ***Brett K, supra*, at **14 (quoting *Denton*, 895 F.2d at 980).** Nor does the IDEA create a cause of action for educational malpractice. ***Sellers*,**

141 F.3d at 527. The fact that the Lovaas program may be better than TEACCH or provide the maximum opportunity for CM's development does not mean that the IEP offered would not have provided a FAPE.

The undersigned finds the Plaintiffs have failed to carry their burden of establishing a violation of the IDEA. The preponderance of the evidence supports the findings of fact and conclusions of law of theALJand SRO.[16]

Plaintiffs also alleged a claim pursuant to NC. Gen. Stat. § 1 l5C-106(b) which provides in pertinent part that it is "policy of the State [] to provide a free appropriate publicly supported education to every child with special needs. The purpose of this Article is to... bring State law, regulations and practice into conformity with relevant federal law." The language of the statute indicates that the standard for such an education should the same as the federal standard under the IDEA. However, "North Carolina apparently does require more than the [IDEA]. The special education program must provide the child with an equal opportunity to learn if that is reasonably possible, ensuring that the child has an opportunity to reach her full potential commensurate with the opportunity given other children." ***Burke County,* 895 F.2d at 983.** Nonetheless, this higher standard does not require a school district to develop a "utopian educational program" for the student with special needs any more so than would be required if the student were not handicapped. ***Harrell v. Wilson County Sch.,* 58 N.C. App. 260, 293 S.E.2d 687 (1982).** To the extent reasonably possible, the student with special needs should be given an equal opportunity to learn. ***Id.*** For the reasons stated *infra,* the Court finds the decisions of the ALJ and SRO supported by a preponderance of the evidence and the Plaintiffs were offered an educational program which would have provided

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[16] The Court has considered arguments raised below but not addressed in the Plaintiffs' brief and finds the decisions below supported by a preponderance of the evidence.

CM an equal opportunity to reach her full potential commensurate with the opportunity given other children.

V. ORDER

IT IS, THEREFORE, ORDERED that this action be dismissed by way of Judgment filed herewith.

THIS the 12th day of October, 1999.

\s\

LACY H. THORNBURG
UNITED STATES DISTRICT COURT JUDGE

27 IDELR 435

Henderson County Pub. Schs.

State Educational Agency

Entered: December 11, 1997

North Carolina

Henderson County Public Schools

No. 96 EDC 0766, 1708

ID45.003 • Autism, Educational Methodologies

ID200.040 • Free Appropriate Public Education (FAPE), Reasonably
Calculated to Provide FAPE

ID285.005 • Least Restrictive Environment (LRE), Autism

ID365.015 • Placement, Autism

ID410.005 • Reimbursement to Parents, In General

Summary

For the 1996-97 school year, a school district and the parents of a 7-year-old student with autism agreed on the student's IEP goals and objectives but disagreed about the appropriate placement for her. The parents wanted the district to fund the student's current in-home Lovaas program, which she had been participating in for several years, and the district proposed placing the student in a regular education kindergarten class for half of the day with

the assistance of a 1:1 aide, one hour per day in an autism classroom, and 1.5 hours a day of one-on-one academic instruction. The proposed district program utilized the TEACCH method of instructing students with autism. The parents requested a due process hearing, seeking reimbursement for the costs of the student's Lovaas program since 1993. The administrative law judge granted the district's motion for summary judgment on all of the parents' claims for reimbursement except for the 1996-97 school year. Currently before the ALJ was the appropriateness of the district's proposed placement.

HELD: for the district.

The administrative law judge determined the district placement, with one modification, was appropriate for the student, as it was designed to allow her to make educational progress in the LRE. The proposed district program addressed the student's needs for 1:1 instruction, speech services, and the development of communication and interpersonal skills. The district placement also provided the student with opportunities for mainstreaming with regular education students. The ALJ noted that the student appeared to have made little progress in the Lovaas program, and the Lovaas program did not address the student's need for the development of functional language and independent living skills. The in-home Lovaas program was also too restrictive for the student. The student's negative behaviors were increasing, instead of decreasing. Accordingly, the proposed district program was appropriate. The ALJ determined the student required a 1:1 aide with Lovaas training during the transition from the in-home program to the district program, and the district was ordered to include this service in the student's IEP. The parents' request for reimbursement was denied.

Administrative Law Judge: Meg Scott Phipps.

Issue

1. Whether respondent offered [] free appropriate education during the 1996-97 school year which was reasonably calculated to allow her to make educational progress.

Reference Abbreviations

T--Transcript of Hearing

I-XIX--Volumes of Transcript

p(p)--Page(s)

Resp--Respondent

Pet--Petitioners

Exh--Exhibit

Based upon the greater weight of the evidence presented at the hearing in this contested case, the undersigned makes the following:

Findings of Fact

1. Petitioners [] and [] are the parents of [], a seven-year-old with autism who is entitled to services as a special needs student in respondent's schools. Respondent, Craven County Board of Education, is a local educational receiving monies pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq.

2. Upon a motion by respondent, this court, by decision of Chief Judge Julian Mann, granted summary judgment for respondent on all of Petitioners' procedural and substantive claims prior to the development of the 1996-97 IEP and denied Petitioners' claim for additional reimbursement for the independent evaluation. The only claim remaining for adjudication in this contested case is Petitioners' claim regarding the 1996-97 IEP. Petitioners had also filed a claim in July 1996 for full reimbursement of an independent evaluation, above and beyond the $1200.00 that had been paid by respondent.

3. Petitioners filed a petition for a contested case hearing in the Office of Administrative Hearings on November 1, 1996, alleging that the educational program offered by respondent to [] for the 1996-97 school year was inappropriate. Petitioners sought reimbursement by the school system of their chosen educational program, the Lovaas method, from November 1993 to the present.

4. [] was diagnosed with autism at approximately age two. During the 1992-93 school year, [] attended a Montessori preschool in New Hampshire three days a week for three hours a day. She was accompanied to the class by an assistant who was not trained in autism. (T.IV, p. 86). [] did not display any aggressive behaviors in class (T.IV, p. 99).

5. Mr. William White, a psychologist with experience in autism who was hired by the []s, consulted monthly with the staff at the Montessori school to discuss []'s autism and assist in her educational programming. (T.II, p. 16).

6. The []s moved to Hendersonville, North Carolina in June 1993 in order to take advantage of services from the Treatment and Education of Autistic and Related Communication Handicapped Children ("TEACCH")

program. (T.III, p. 13). The []s learned of the TEACCH program by attending conferences on autism and researching available programs. (T.II p. 20-21). They moved based on their understanding that TEACCH is a nationally known program for autistic students and their families. (T.VI, p. 68).

7. The TEACCH program, begun with support of the state legislature in 1972, is a comprehensive system that provides treatment, education and support for autistic children, adults and their families. TEACCH provides evaluations and consultation to school systems throughout North Carolina, the U.S. and the world. (T.XIX, pp. 19-40).

8. The TEACCH philosophy focuses on using meaningful routines and visual clarity to teach autistic individuals to function independently. Through the use of structure and clarity, the autistic person is taught to understand concepts, work skills and expectations. The skills that are learned at the pre-school level are built upon as the individual with autism grows older, leading to greater independence and adaptability in the classroom, home setting, group home, vocational or supported employment settings. The TEACCH approach focuses on the student's strengths and on what children with autism personally find motivating or interesting and utilizes these in a creative manner to teach new skills. (Resp. Exh. 73).

9. In July 1993 [] was evaluated by Sloan Burgess at the TEACCH center in Asheville, North Carolina. (Resp. Exh. 46). Sloan Burgess testified to her extensive experience working with individuals with autism. She has been employed by TEACCH since 1991 as a special education specialist. In that role she conducts diagnostic evaluations, provides consultation to school systems, provides parent and professional training and organizes and conducts support groups for families. (T.XVIII, p. 6).

10. Ms. Burgess testified that during the July 1993 testing [] showed areas of substantial deficit in social relatedness. (T.XVIII, p. 14). She displayed no functional language except for the word "no" but she babbled throughout the evaluation. (T.XVIII, p. 13).

11. In August 1993, the []s along with Sloan Burgess met with Henderson County school personnel to develop an IEP for []. (Resp. Exh. 2). The []s, Ms. Burgess and school personnel agreed that [] should be served in the TEACCH preschool classroom which was just being developed at the Helping Hand Center. []'s IEP called for her to be in a full day program specially designed for students with autism. (Resp. Exh. 2). This was the first time [] had been placed in a class specially designed for autistic students. The IEP also called for two half-hour sessions of speech therapy weekly. (Resp. Exh. 2).

12. William White also advocated placement of [] in the Helping Hand TEACCH class. In a consultation report provided to school personnel in August 1993, Mr. White stated "it is very important to note that [] needs plenty of time to learn about her educational environment. At first staff should follow her lead and capitalize on the few teachable moments she gives you; then increase your expectation level as she becomes more comfortable." (Resp. Exh. 43). The report also noted that Mr. White "felt quite strongly" that "[] can develop verbal communication." (T.IV, p. 103) (Resp. Exh. 43). He advocated the use of picture schedule boards, choice boards, verbal modeling and the use of sign language. (T.IV, p. 102). All of these suggestions were incorporated into []'s IEP. (Resp. Exh. 2).

13. Faye Arlege, the teacher in the Helping Hand classroom, and Sloan Burgess, who provided consultation to the classroom, testified that [] made good progress during the short time period she was enrolled in the class. (T.XI, p. 17).

They indicated that [] learned how to work on a specific task by sitting at a table, attending to the task and manipulating the materials. (T.XI, p. 19).

14. Although []'s IEP called for a full-day program, [] only brought [] for half day for most of the time she was enrolled. (T.XI, p. 15).

15. Ms. Arledge testified that a typical class day involved group time and individualized instruction for each student. (T.XI, p. 13-14). She had a program of reverse mainstreaming (T.XI, p. 69) and two of her students also were mainstreamed for short periods of time each day. Ms. Arledge and Ms. Burgess testified that in their opinion mainstreaming was not appropriate for [] at the beginning of the school year but it would have been an option later in the year if she gained enough skills to make it appropriate. (T.XI, p. 21-22).

16. Faye Arlege and Sloan Burgess testified that [] did not have significant behavioral problems while in the Helping Hand classroom. (T-XI, p. 22). The speech-language IEP drafted for [] from 1/94-1/95 states in present level of performance that [] "does not display aggressive behaviors. Responds well to structure and routine." (Resp. Exh. 3).

17. [] testified that she learned of the Lovaas program in October 1993 by reading a book by Catherine Maurice in which Ms. Maurice recounts the "recovery" of her two children from autism. After reading the book, in mid-October 1993, [] contacted UCLA and arranged for the Ann Maxwell from the Chicago Program to conduct a Lovaas training workshop. (T.IV, p. 128). The workshop was scheduled for December 1993.

18. The Lovaas program is described in the program literature as a "treatment" approach "that specializes in

helping pre-school children who are autistic and/or mildly to moderately retarded." (R. Exh. 184). The program uses behavioral techniques derived from the research of Dr. Ivar Lovaas of the UCLA Psychology Department conducted in the 1970's. (P. Exh. 7, p. 81). The Lovaas research claimed that 47% of the 19 subjects in his study achieved "normal educational and intellectual functioning by 7 years of age." (Id.). The program emphasizes "discrete-trial teaching," involving the use of repeated verbal prompts to elicit specific verbal or behavioral responses. Positive reinforcers such as candy, tickles and verbal praise are used to reward correct responses, "contingent aversive NO's" spoken in a loud voice are used as negative reinforcers. (R. Exhs. 184; 73). Other negative consequences are delivered for unacceptable behavior.

19. Dr. Lovaas has established a for-profit center to provide Lovaas "workshops," "designed to help families set up treatment programs of their own." (R. Exh. 184, p. 4). Through the workshops, parents and staff members (recruited by the parents) are trained in the Lovaas method. Staff members are referred to as "therapists." They do not require any special credentials or previous experience to be qualified to be therapists. The Lovaas Clinic recommends dependable college students as good candidates. In addition to training the staff, the Lovaas program provides a UCLA consultant who visits the home site quarterly to monitor and advise regarding the program. The consultants may be graduate students or recent college graduates who have worked in the Clinic. (R. Exh. 184).

20. On November 23, 1993, the []s removed [] from the Helping Hand classroom. In a letter of that date to Candy Priest, supervisor for Exceptional Children's program for the Henderson County Schools, [] indicated his two reasons for removing [] were the published results of studies that the behavioral (Lovaas) approach is highly successful and the []s

belief that the Montessori classroom was the best placement for []. He did not express any discontent with the TEACCH program. (Resp. Exh. 72).

21. Dr. Lee Marcus, the Clinical Director of the Chapel Hill TEACCH Center, testified that three months of education in the TEACCH classroom was not a sufficient amount of time to judge the success of program in light of her age and her lack of prior enrollment in a structured classroom for students with autism. (T.XIX, p. 191-192).

22. Although [] was no longer receiving special education services from the respondent's schools, respondent agreed to continue to provide [] speech language services even though not required to according to the Department of Public Instruction. (T.XI, p. 132). In January 1994, an IEP meeting was held to develop a new speech IEP for [] and her speech service time was increased to two hours a week. (T.XI, p.133).

23. On December 21, 1993, the []s began implementing the Lovaas program with [] for 20 hours a week. (T.IV, p. 153). [] testified that she knew the Lovaas program was working for [] because she went from being nonverbal to using words within the first months of the program. She testified that [] was unable "to imitate a single thing" or to repeat any words "on command" prior to starting Lovaas. (T.VI, p. 31). However, the speech records of Karen Perella show that [] was able to both imitate motions and to say certain words in October and November 1993. (Resp. Exh. 174). Ms. Perella testified that []'s language was emerging at that time prior to her beginning the Lovaas program. (T.XV, p. 217). Sloan Burgess testified that []'s lack of spontaneous language was not an area of concern for her since [] had prerequisite skills which suggested her language and communication would develop over time. (T.XVIII, p. 22-23). Dr. Marcus also testified that [] showed early

indicators that she was likely to develop speech, given her non-verbal IQ score, echolalia and good early services. (T.XIX, p. 115-118).

24. In August 1994, the []s began working with the UCLA Lovaas program. (T.IV, p. 164). []'s therapy was increased to 40 hours a week and her amount of time in school decreased. [] met with Candy Priest and requested a copy of []'s student records. At that time, Ms. Priest informed [] that the school system could provide special education services to [] at her private school. (T.XI, p. 144). [] declined the offer indicating that he and his wife did not want the private school to know that [] had autism. (T.XI, p. 144).

25. In December 1994, [] contacted Candy Priest to request that the school system begin paying for the Lovaas program. (T.XI, p. 144-145). Ms. Priest indicated that it would be necessary for the []s and school personnel to meet to discuss []'s educational needs and to determine an appropriate educational placement for her. (T.XI, p. 144-145). In January and February 1995 the []s and school personnel held a series of meetings to develop an IEP for []. (T.XI, p. 145-146).

26. While in the process of developing the IEP, Judy Cook, the Director of Exceptional Children's Programs, and Sharon Burlingame, a special education teacher, visited the home to observe the use of Lovaas therapy with []. (T.VI, p. 145) (Resp. Exh. 171). Judy Cook testified that [] appeared very tired during the therapy and hit herself in the face several times out of apparent frustration and weariness. (T.IX, p. 80-82).

27. On February 15, 1995, a final IEP meeting was held. At that time, the school-based committee considered four possible programs for []: the Helping Hand Classroom, Sharon Burlingame's classroom, the TEACCH classroom at

Bruce Drysdale school and the Lovaas program. (T.VI, p. 196-97). The committee recommended that [] be placed in a full-day program for autistic students at Bruce Drysdale school with some mainstreaming in a regular kindergarten classroom. (T.VI, p. 197). The []s continued to request that the school system pay for the Lovaas program. Judy Cook indicated in the meeting that it was her belief that the Lovaas program was too restrictive for [] and that the program offered by the school system was more appropriate. (T.VI, p. 203) (T.VIII, p. 84). The []'s pointed to the Lovaas study and indicated that unless the school system could provide comparable data showing 47% of the students becoming indistinguishable from regular education students then they felt the Lovaas program was the best option. (Pet. Exh. 56).

28. The next day, Judy Cook sent the []s a letter again detailing the rationale behind the school-based committee's decision. (Resp. Exh. 78). Mrs. Cook enclosed a Parent's Rights Handbook and explained in the letter that the []s could pursue a due process hearing in light of their disagreement with the school system's offer of services. (Resp. Exh. 78) (T.VI. p. 203-204).

29. Although the []s initially indicated in the spring of 1995 that they would like to pursue mediation with the school system over the placement decision, in May 1995 the []s wrote to Judy Cook and stated that they had obtained representation by the Governor's Advocacy Council and that they were not available for mediation. (Resp. Exh. 84). The []s never pursued mediation after that point.

30. At the end of June 1995, the []s requested that the school system pay for an independent educational evaluation of [] (T.IX, p. 8). Because the most recent evaluation of [] was at that point over a year and a half old, Judy Cook requested that the school system be allowed to test [] first and that the []s could obtain an independent evaluation if

they disagreed with the results of the school system's evaluation. (T.IX, p. 8-9).

31. An evaluation of [] was conducted by school personnel in August and September 1995. (T.VIII, p. 219-220). In October 1995 the []s and school personnel met to review the results of the evaluation. (T.IX, p. 9). [] requested that one portion of the testing be readministered, and it was redone although the results did not markedly change. (T.IX, p. 10).

32. Because []'s February 1995 IEP was to expire in January 1996, school personnel invited the []s to meet in November 1995 to begin developing an IEP for the 1996-97 year. (T.IX, p. 11). A school-based committee meeting was held in November and at that time school personnel presented to the []s a draft IEP to begin the discussions. (T.IX, p. 10). The []s stated that [] had already mastered many of the proposed goals and objectives. (T.IX, p. 12). Some time after the meeting, the []s provided school personnel with a copy of the draft IEP that had been reviewed by Michael Guiou, their UCLA Lovaas consultant, and on which Mr. Guiou indicated many areas that [] had "mastered." (T.IX, p. 11) (Resp. Exh. 9).

33. In December 1995 the []s renewed their request for an independent educational evaluation stating that the evaluation conducted by school personnel was insufficient. (T.IX, p. 12). Judy Cook replied that the []s could pursue an independent evaluation and they would be reimbursed up to $1200 (the school system's maximum amount for independent evaluations). (Resp. Exh. 119).

34. The []s and school personnel jointly agreed to postpone the development of []'s full IEP for the 1996-97 year until the independent evaluation was completed. (Resp. Exh. 7, 115). []'s speech therapy IEP was reviewed in

January 1996 and services continued to be provided by respondent. (Resp. Exh. 4).

35. In January 1996, long before the independent evaluation was complete, [] wrote to Michael Guiou and stated that [] "will be attending a small private school next year with eight or nine children" and that the teacher of the class would be working with [] over the summer. (Resp. Exh. 189).

36. In March 1996, Dr. Jan Handleman, an educator and professor in New Jersey, conducted an assessment of []. (Resp. Exh. 57). His assessment consisted of a []'s file and a videotape provided by the []'s and an observation of [] working with her Lovaas therapist. (T.V, pp. 41-42). Dr. Handleman conducted no formal testing of []. The evaluation was provided to school personnel in early April 1996. (T.VIII, p. 222).

37. Dr. Handleman's report provided no information on []'s present level of educational performance, a necessary element for the development of an IEP. (T.VIII, pp. 223-225) (T.IX, pp. 12-13). Because the parents and their Lovaas consultant, Mr. Guiou, had both indicated that [] had mastered many of the draft goals and objectives on the proposed IEP, Judy Cook testified that she was concerned that Dr. Handleman's report was not sufficient to assist in IEP development. (T.VIII, p. 224). As a result, Judy Cook, sought the assistance of Dr. Victoria Shea, an expert in autism, to informally assess [] in order to provide information for IEP development. (T.VIII, p. 225).

38. The []'s agreed to Dr. Shea's involvement. Dr. Shea reviewed all of the records available on [] and observed [] in her home program and at her private school on May 20, 1996. (T.XVIII, p. 254). Dr. Shea also observed in Ms. McDanel's and Ms. Arledge's classrooms. Dr. Shea noted

that [] was very compliant during the observation period but that she became quite confused when she was not given prompts. [] did not initiate any contact with her peers during the observation period at school. (Resp. Exh. 58).

39. Dr. Shea completed her observation report on May 30, 1996, and recommended that IEP goals be written in several specific areas for []. (Resp. Exh. 58). In particular, Dr. Shea indicated that [] needed work in developing independence and functional language. It appeared to Dr. Shea that [] had memorized language but was unable to use language functionally in many cases. (T. XVIII, pp. 199-200). She also recommended development of self-help skills and academics. (T.XVIII, pp. 220) (Resp. Exh. 58).

40. Dr. Shea's report noted and she testified that although Mr. Guiou and the []'s indicated that [] had mastered numerous skills on the proposed IEP, [] was not able to perform those skills when Dr. Shea observed her. (Resp. Exh. 58). In light of the conflicting information regarding []'s ability levels, Dr. Shea advised that [] should be given more assessments to gauge her present level of functioning. (Resp. Exh. 58).

41. The evidence showed that the skills that Mr. Guiou and Mrs. Miller claimed [] had "mastered" in February of 1996, were not mastered in the school environment as documented by []'s teachers at the preschool. (Resp. Exh. 9); (Resp. Exh. 194). The teachers, responding to a questionnaire from [], noted that many of the goals which had been proposed for []'s IEP in November 1995 were either not attained or emerging by May 1996. (Resp. Exh. 194). Dr. Shea testified that Mr. Guiou's report of []'s mastery was not reliable. The evidence also showed that the skills claimed as "mastered" by [] at the time of the hearing, were not "mastered" in the school environment or across all settings but rather only mastered, according to her testimony,

in the one-on-one therapy environment. (T.V, p. 76-77). Judy Cook testified that these inconsistencies caused the school system to question the evaluation information being provided by the []s and it became important for school personnel to do additional observations or informal assessments of []. (T.IX, pp. 20).

42. On May 29, 1996, Laurie McDanel and Janna Forst visited the []s home in order to observe [] in her Lovaas program. (T.V, p. 73) (Resp. Exh. 59). The purpose of the visit was to gather more information on []'s present level of performance for the IEP development. Ms. McDanel testified that when she and Ms. Forst entered []'s therapy room, [] did not look up or acknowledge their presence. (T.X, p. 169). She noted that the therapy appeared to elicit information from []'s rote memory, rather than eliciting spontaneous communication. (T.X, p. 185). As a professional educator, Ms. McDanel believed the therapy to be too intense in light of the limited amount that [] was able to do during the time period. (T.X, p. 185).

43. In order to follow up on the visit, Ms. McDanel met again with [] prior to the IEP meeting to again discuss []'s present level of performance and her needs. (T.X, p. 186). This information was used in developing the IEP. (T.V, pp. 73-74).

44. An IEP meeting was scheduled for June 5, 1996, and following Dr. Shea's recommendation, Judy Cook requested that a teacher administer the Brigance test with [] prior to the meeting so that the IEP committee would have more information on []'s current level of academic functioning. (T.IX, pp. 20-22). The []s would not agree to the administration of the Brigance by school personnel and instead stated that they would have it done privately and requested that the IEP meeting be rescheduled. (T.V, pp. 43-45).

45. In late July 1996, the []s took [] to be evaluated by Dr. Thomas Boyle, a private psychologist in New Jersey who had worked with Dr. Lovaas. (T.V, p. 48). Dr. Boyle conducted intelligence and achievement testing with []. (Resp. Exh. 60). Dr. Boyle admitted in his report and in his testimony that he deviated from standard administration of the tests in several areas in order to try to elicit responses from []. (Resp. Exh. 60). He also acknowledged that these deviations from the norms could have resulted in inflating []'s scores on the testing. (T.XV, pp. 72-73). At the parents' request Dr. Boyle did not report []'s IQ score in his evaluation report. (T.XV, pp. 51). Her IQ placed her in the mildly mentally handicapped range. (T.XV, p. 113). Her achievement scores indicated that she was functioning at the beginning kindergarten level in math and reading. (T.XV, pp. 50). Dr. Boyle testified that [] needed lots of prompting during the testing and that sometimes he had to reword questions to elicit responses from her. (T.XV, p. 75-76).

46. Dr. Boyle's report recommended continuation of the Lovaas program with [] including 15-20 hours of one-on-one discrete trial teaching. (Resp. Exh. 60). Dr. Boyle admitted in his testimony that it was not proper to make a placement recommendation for a student based solely on testing results, nonetheless, he based his recommendations for placement in the Lovaas program solely on his evaluation results. (T.XV, p. 70) Dr. Shea testified that there was nothing in Dr. Boyle's testing results which would lead to the conclusion that [] needed discrete trial teaching or 15-20 hours of one-on-one. (T.XVIII, p. 232).

47. The []s also hired Dr. Jan Blacher, an education professor from California, to visit the classrooms for autistic students in Henderson County and to observe [] in her home program. (T.V, p. 67). Dr. Blacher testified that her area of expertise is not autism. (T.VIII, pp. 36-37). In her

correspondence with the parents and prior to visiting the school system or having any contact with [], Dr. Blacher stated that she would do everything she could to assist them in getting funding for their home program. (Pet. Volume 1, Exh. 2. BS 8817-8818). Dr. Blacher visited the classrooms in August 1996; however, none of the opinions or information gathered in Dr. Blacher's visit were shared with school personnel during the IEP development process in August and September 1996. (T.V, p. 71).

48. Dr. Boyle's report was provided to school personnel in early August (T.IX, p. 27). Ms. Cook testified that in her 15 years of experience reviewing evaluations she had never received a report where the evaluator had conducted an IQ test but failed to provide the score. (T.IX, p. 28). Dr. Shea also noted that it was very uncommon for an evaluator to conduct an IQ test and then not report the scores. (T.XVIII, p. 234).

49. An IEP meeting was held on August 14, 1996, and the []s attended with their attorneys. (T.IX, p. 32); (Resp. Exh. 68). At that time the committee began developing goals and objectives for the IEP based on the evaluation reports, the observations, and the []s input regarding []'s progress in her home program. (T.X, p. 188) (T.IX, pp. 42-43). The present level of performance in many areas of the IEP was developed based solely on parent report because no other information about []'s skill levels was available at that time. (T.X, p. 225).

50. At this same time, []'s monthly documentation in the home program noted that "[] has forgotten a lot of information. Much of what she learned was never generalized completely." (Resp. Exh. 197). [] testified that she realized [] had not generalized skills after receiving Dr. Boyle's report. (T.V, P. 101).

51. After the August 14 meeting the []s requested that another meeting be held in mid-September so that their Lovaas consultant, Michael Guiou, could attend to participate in the IEP development. (Resp. Exh. 69) (T.X, p. 189). A meeting was held on September 13, 1996, which the []s attended along with Mr. Guiou. (T.IX, pp. 49-51).

52. Despite the fact that [] was having significant behavioral problems at home and in school at that time, the []s and Mr. Guiou did not share that information with school personnel. (T.V, p. 231) (T.IX, pp. 51-52). [] also indicated that she could not recall if she had shared information on []'s aggressive behaviors with Dr. Boyle and Dr. Handleman when they evaluated []. Dr. Boyle testified that he had no information about []'s behavioral status at the time of his evaluation. (T.XV, p. 68). However, the []s later criticized school personnel for not having created a behavioral management plan for []. (Resp. Ex. 157).

53. On September 23, 1996, a final IEP meeting was held and the []s attended along with their attorneys. (Resp. Exh. 70); (T.IX, p. 53). At that time the parents and school personnel all agreed that the goals and objectives on the IEP were appropriate. (T.X, p. 190). The committee then discussed possible placements for []. There was extensive discussion of her need for one-on-one instruction and her need for development of social and communication skills. The committee proposed that [] spend half of the school day in a regular kindergarten class with a one-on-one assistant; one hour a day working independently with monitoring in Laurie McDanel's classroom for autistic students, and one and a half hours a day receiving one-on-one instruction in academic areas in a separate room with Laurie McDanel. (T.X, pp. 191, 199). The IEP also called for three hours a week of speech services (two hours of direct services and one hour of consultation between the speech therapist and []'s teachers). (T.IX, pp. 57).

54. The kindergarten time would be used to work on []'s social skills and communication skills because in the classroom she would have opportunity for peer modeling and interaction. (T.X, p. 200). The one-on-one instruction could include some discrete trial teaching but would not be limited to that one method of instruction. (T.X, pp. 199-200). Ms. McDanel described in detail how she would teach each of the objectives in []'s IEP. (Resp. Exh. 172-B). In guided practice, [] would work in her specific work area in the classroom doing work that had been taught in the one-on-one setting. (T.X, pp. 230).

55. Laurie McDanel's classroom has two teaching assistants both of whom have been trained to work with autistic students. (T.X, p. 7). One of the teaching assistants has an autistic child. (T.X, p. 7). There are seven students who spend some time each week in Ms. McDanel's class; four of the students are not in the classroom full-time as they are mainstreamed for parts of the school day. (T.X, p. 19). Ms. McDanel testified that had [] joined the class, another teaching assistant would have been hired for the classroom. (T.X, pp. 28, 115). She noted that she would have proposed that [] attend the kindergarten class for the morning and come to the autistic class in the afternoon. (T.X, p. 117).

56. A primary goal in Ms. McDanel's classroom is to teach the students to work independently. Each student works independently for part of the day. Data is kept by the teacher and teaching assistants as to how well the student is completing his or her individual work and progress is noted on the student's IEP. (T.X, pp. 51-52). A daily anecdotal log is kept of the each mainstreamed student's progress in the regular classroom. (T.X, p. 54).

57. Ms. McDanel described the progress of many autistic students in her classroom, particularly in developing

independence and communication skills. (T.X, p. 153). To teach functional language, Ms. McDanel attempts to have the students communicate about areas of interest by setting up play activities in the classroom and by allowing the student to take the lead in choosing activities to communicate about. (T.X, pp. 155-156).

58. Based on her observation of [] in therapy, her review of []'s records and her review of videotapes of [] at Covenant Academy and in her home therapy, Ms. McDanel testified that [] was not functioning as independently as had been reported by her parents or as independently as other autistic students in Ms. McDanel's classroom. (T.X, pp. 192-193). Specifically, Ms. McDanel noted she was concerned that [] was unable to do work in a small group without constant prompting from her assistant. (T.X, p. 193). Ms. McDanel also stated that [] did not display the communication skills that many of the students in her classroom have. (T.X, p. 218). This was true despite the fact that Dr. Wynn testified that 80 percent of the Lovaas program is "language" and developing communication skills. (T.XIII, p. 110).

59. Sloan Burgess described her role as a consultant to Ms. McDanel's classroom. (T.XVIII, pp. 7-8). Ms. Burgess assists Ms. McDanel in educational planning for the students. (T.XVIII, p. 17). Ms. Burgess testified that she had seen great progress in the students in Ms. McDanel's class, particularly in the area of language development. (T.XVIII, pp. 19, 49-50). Having reviewed a videotape of [] in November 1996 at school, Ms. Burgess indicated that she was concerned about []'s dependence on her assistant and her lack of spontaneous language and initiation of play with peers. (T.XVIII, pp. 55-56). Ms. Burgess said she would have expected much more progress in those areas had [] been in a TEACCH classroom for two and a half years instead of in the Lovaas program. (T.XVIII, p. 56).

60. Dr. Lee Marcus, the Clinic Director of TEACCH in Chapel Hill, testified about the TEACCH program. (Resp. Exh. 224). In his 23 years working at TEACCH, Dr. Marcus has worked with thousands of autistic individuals. TEACCH's primary mission is to work in North Carolina. but Dr. Marcus indicated that TEACCH training and programs are set up in every continent except Antarctica and in many states across the U.S. (T.XIX, pp. 36-39).

61. Dr. Marcus described the underlying philosophy of the TEACCH classroom in fostering independence and communication skills in the students. He explained that unlike Lovaas. TEACCH is not a teaching technique but rather an umbrella structure for the classroom that allows students to become independent and to use language functionally while working on their individualized educational goals and objectives. (T.XIX, pp. 144-147). He noted that TEACCH and Lovaas have different philosophies about autism. (T.XIX, p. 139). TEACCH believes that autism is a unique disorder explained by cognitive characteristics and that individuals with autism should be provided a structure and taught strategies to make the world more understandable to them. (T.XIX, p. 50). The Lovaas approach, on the other hand, believes that autism is a made up of a group of behavioral deficiencies which can be repaired so that an individual is "recovered" or becomes "indistinguishable" once taught a series of standard programs and drills. (T.XIX, pp. 140-141). Dr. Marcus testified that he has never seen an individual who has "recovered" from autism and that he believes it is not a realistic goal for parents. In fact, he stated that such a goal creates expectations which are too high and does not allow for the parents to accept the reality of having a child with autism. (T.XIX, pp. 161-174).

62. Although Dr. Blacher testified that the focus of the TEACCH program was to prepare students for sheltered

workshops, (T.VII, p. 299) both Dr. Marcus and Sloan Burgess stated that in their experience with the TEACCH program they have witnessed myriad outcomes of students ranging from obtaining graduate degrees and having families to working in a sheltered workshop. TEACCH's goal is to assist autistic individuals in becoming as independent and functional possible. (T.XIX, pp. 25-28).

63. Dr. Shea testified that in her opinion the placement proposed for [] by the Henderson County Schools was appropriate and would benefit [] more than a continuation of the Lovaas program. (T.XVIII, p. 238). Dr. Shea opined that []'s program needed to emphasize functional language and the development of independence, two areas of significant weakness which were not being adequately addressed through the Lovaas program. (T.XVIII, pp. 218-219). The time in the proposed placement for guided practice and provision for mainstreaming with an assistant to monitor her progress, would encourage independence. She noted that the TEACCH approach to teaching communication which is incorporated into Ms. McDanel's classroom, could benefit [] by lessening the focus on verbal communication and supplementing language with visual cues. (T.XVIII, p. 248). Dr. Shea stated that Dr. Boyle's testing and her observations indicated that [] is a visual learner and the Lovaas focus on oral language appeared overwhelming to [] at times. (T.XVIII, pp. 245-246).

64. [] disagreed with the proposed placement for the 1996-1997 school year and stated that they wanted the school system to pay for their home program. Both [] and [] testified that the only program they would have accepted for [] was the Lovaas program. (T.VI, pp. 110).

65. Although Dr. Blacher testified that the placement proposed by the school system was too restrictive, it was actually less restrictive under North Carolina standards than

[]'s home program because it provided for more time per week for [] to be educated with regular education peers and in the regular school environment. (Resp. Exh. 10) (T.IX, p. 72).

66. School personnel considered the []'s request that [] be continued in the Lovaas program but believed that the school system's proposed program was more appropriate. Judy Cook testified that she believed the Lovaas program was not appropriate for [] for the 1996-97 school year. (T.IX, p. 73). She stated that the program was too intensive in that it required that the child undergo therapy for 40 hours a week (or more in []'s case). (T.IX, pp. 73-74). She believed that the constant one-on-one caused [] to become too dependent on adults and that []'s social and communication skills were not being effectively developed. (T.VI, p. 132, 144; T.IX, p. 74).

67. Laurie McDanel testified that she believed the proposed program would be better for [] for the 1996-97 school year than the Lovaas program. (T.X, p. 233). Specifically, she noted that it would allow []'s placement in a true kindergarten class to develop her social and communication skills which are her areas of greatest need. (T.X, p. 233). Also the proposed IEP would allow for [] to become more independent be spending time each day without consistent prompting or one-on-one assistance. (T.X, p. 234).

68. Rather than enrolling [] in the respondent's schools for the 1996-97 school year, the []s continued to implement the Lovaas program. [] testified that the total expected cost of the home program for the 1996-97 school year would be between $45,000-$50,000. (T.XVII, pp. 19-21). Judy Cook testified that the average amount spent on autistic students by the county is $11,000 a year (T.IX, p. 180) and that offering the Lovaas program to any autistic student in the county whose parents requested it would have a staggering financial

impact on the school system. (T.IX, p. 92). Ms. Cook additionally noted that in light of her significant concerns about the Lovaas therapy, even if she had unlimited funds she would not recommend Lovaas therapy for students. (T.IX, p. 94).

69. [] testified about her administration of []'s Lovaas program prior to the 1996-97 school year. She stated that she had hired 20 different therapists to work with [] between December 1993 and December 1996. Many of the therapists worked for less than six months with []. (T.IV, pp. 154-175). Most of the therapists had no background in education and no experience working with children with autism. (T.IV, p. 184).

70. Caroline Dilworth was hired by the []s in June 1995 after just completing college with a degree in psychology. (T.XII, p. 7). She had no previous experience working with autistic students or the Lovaas program. During the 1995-96 school year she served as []'s one-on-one assistant in her private school classroom. Dr. Jacqueline Wynn, the assistant director of the Lovaas Institute, testified that the Lovaas program recommends that an assistant have at least nine months of experience in the program before accompanying a child into a classroom and the bare minimum would be six months of experience. (T.XIII, pp. 78, 218). Caroline had just two months of experience when she went with [] to school. (T.XIV, p. 172).

71. Beginning in September 1996 Caroline Dilworth took over the position of administrator of []'s program. She and the []s testified she worked full-time, at approximately forty hours a week, for the []s. Ms. Dilworth testified that []'s program consists of over 47 hours weekly including home therapy, school, peer play and speech therapy. (T.XIV, p. 174). There are three other therapists who work with []. (T.XIV, p. 189). Dr. Wynn testified that the Lovaas program

recommends only between 35-40 hours a week of therapy. (T.XIII, p. 249). The information materials of the Lovaas Institute provided to the []s describe the "workshops" like the []s that are distant from UCLA and coordinated by a consultant as being only 30 hours per week. (R.Exh. 184, p. 4).

72. [] testified that program changes were made by Michael Guiou who conducts two day workshops with the therapists every three months. (T.IV, p. 188). Mr. Guiou at the time he began working with [] had recently graduated from college. He works in Los Angeles and is available by phone to discuss []'s program. Dr. Marcus indicated concern with this consultation model in which program changes are made by an individual who is so far removed from the student. (T.XIX, p. 156).

73. [] attends a Christian "academy" for four and a half hours a day and is accompanied by Caroline Dilworth. Ms. Dilworth also provides therapy at home and during peer play. (T.XIV, pp. 191-192). Ms. Dilworth acknowledged that although the Lovaas program advises that one therapist not spend more than 15 hours with a child each week, she spends approximately 27 hours a week with []. (T.XIV, pp. 192-194). The Lovaas program literature indicates that too much time with one therapist can lead to dependence by the child on the individual therapist. (Resp. Exh. 174).

74. At the beginning of the 1996-97 school year there were six students in []'s class at Covenant Academy. Until February 1997 the class was taught by Tina Salter who had little teaching experience and no experience working with students with autism. Ms. Dilworth testified that Ms. Salter did not do a good job using classroom materials and structuring the school day. (T.XIV, pp. 178-179). Ms. Salter was terminated from her employment at Covenant Academy in late fall and replaced by Kate Scharstein, a parent of an

autistic student, was a college graduate but who had no training or experience as a teacher. (T.XIV, p. 145).

75. By the time of the hearing in March there were eight full time students and two part time students in the class. [] had been in a class with approximately 15 students during the past two school years. (T.VI, p. 17). Dr. Wynn stated that the Lovaas program's goal was to gradually introduce a student into social and group settings as therapy progressed. (T.XIII, p. 217) She stated that a class size of 14-15 students, like []'s class during the 1994-96 school years and similar to the regular kindergarten class proposed in the Henderson County schools, was the right size class (T.XIII, p. 218). She indicated that if the class was much smaller, like [] class at Covenant Academy during the 1996-97 school year, problems might occur. (T.XIII, p. 218). Dr. Wynn also stated that where an autistic student is functioning socially and in language skills at the kindergarten level (even if the student is older than kindergarten age), the appropriate placement for working on those skills would be a kindergarten class. (T.XIII, pp. 221-222). She acknowledged that The Me Book, written by Dr. Lovaas, states that the age of the classroom grouping is not as important as the functioning level of the peers in the class. (T.XIII, p. 222).

76. Ms. Dilworth stated and her records reflected that she frequently removed [] from the Covenant classroom either for bad behavior or when [] was distracted and not paying sufficient attention to her classwork. (T.XIV, p. 294).

77. While in []'s classroom, Ms. Dilworth also provided assistance to other students. This included assisting the students with religious instruction. (T.XIV, p. 294).

78. Dr. Wynn described the Lovaas program as being composed of a hierarchy of skills. (T.XIII, p. 97). She stated that documentation of mastery was vital to the program

because it illustrates when the student is ready for the next skill to be taught. (T.XIII, p. 97). [] described thousands of pages of logs kept on []'s program. However, she also acknowledged and the documents revealed that many skills once thought "mastered" by [] had to be retaught. (T.V, p. 101) (Resp. Exh. 197). (T.XVII, p. 217). Kate Scharstein, a witness for the []s and the parent of an autistic student who also was using the Lovaas program, stated that in her experience with the program she never had to reintroduce a skill to her son as once a skill was "mastered" it no longer had to be worked on.

79. There was no testimony that [] needed the Lovaas method in order to make progress. In fact, Kate Scharstein, her teacher and Karen Perella, her speech therapist, testified that they did not exclusively use the Lovaas method when working with []. Ms. Dilworth testified that beginning in February 1997, Lynn Gilpin began working in the Covenant classroom one day a week to teach reading to the students. Ms. Gilpin had no Lovaas training. She worked with [] one-on-one on reading and did not use the discrete trial method. (T.XIV, pp. 157-158).

80. The testimony and evidence indicated that [] developed aggressive behaviors including biting, kicking and head butting while in the Lovaas program. [] testified these behaviors developed after two years of Lovaas therapy. The monthly reports prepared by Caroline Dilworth for Michael Guiou show that aggressive behaviors were of significant concern in the fall of 1996 and as late as January 1997 both at home and in school (T.VI, pp. 100-106). (Resp. Exh. 198).

81. [] and Caroline Dilworth testified that Michael Guiou recommended a variety of behavioral techniques to use with [] and none of the techniques were successful. (T.IV, pp. 242-243). Ultimately, [] decided to start spanking [] for her aggressive behaviors. (T.VI. pp. 10-11). Dr. Shea testified

that her review of []'s behavioral records led her to the conclusion that the behavioral techniques used with [] did not address the probable root causes of the behavior but rather simply punished [] for the behaviors. (T.XVIII, p. 186). Dr. Shea noted that negative behaviors are typically seen with autistic students when they are frustrated by an inability to understand language or social nuances. (T.XVIII, p. 181). No effort was made to modify []'s environment to reduce these frustrations; rather, [] was punished for her behavior.

82. Karen Perella, []'s speech therapist, testified that she did not see any aggressive behaviors in therapy where she did not use a strict Lovaas approach and she was not aware that aggressive behaviors were a problem. (T.XV, p. 242). She acknowledged that if [] were exhibiting aggressive behaviors it would cause her significant concern. (T.XV, p. 243).

83. Laurie McDanel, Faye Arledge and Sloan Burgess testified that in their experience working with autistic students in the TEACCH classrooms, it was very rare for a student's behavior to get worse with time. In fact, they each testified that students' behaviors typically became better in the classroom as they learned to communicate and learned the classroom routine. (T.X, p. 194; T.XVIII, p. 64). Dr. Wynn testified that aggressive behaviors are typically seen at the beginning of a child's program and decrease over time. (T.XIII, p. 245). She stated that it would be unusual to see a child's aggressive behaviors increase over time. (T.XIII, p. 246).

84. There was no testimony regarding how long the Lovaas therapy would need to be continued with []. Dr. Wynn testified students stay in the program six years or longer and that there is no typical time frame. (T.XIII, pp. 131-135, 217). When asked about the length of []'s program,

[] stated that Michael Guiou would have to answer that question. (T.IV, p. 197). When pressed, [] noted that [] was close to the end of the formal programs and that "the next few years" would be fine-tuning her skills in the program. (T.IV, p. 197). Later in cross-examination she stated there was a lot of fine-tuning to be done and she did not know whether [] was near the end of her programs. (T.VI, p. 110). Michael Guiou was never called to testify by petitioners.

85. In February the []s took [] to be reevaluated by Dr. Boyle. (Resp. Exh. 62). The testing showed that []'s academics were still on beginning kindergarten level (as they had been during his testing eight months earlier). (T.X, p. 225-226) (Resp. Exh. 61). Although [] could decode words at the beginning second grade level she was completely unable to perform on the comprehension tests. (T.X, p. 226). The IQ testing again showed [] to be functioning in the mild mentally handicapped range. (Resp. Exh. 61).

86. Dr. Boyle also conducted some testing of []'s expressive and receptive language. (Resp. Exh. 61). Karen Perella testified that when comparing her results of testing [] in 1995 with Dr. Boyle's 1997 results, [] had not made much progress particularly in her receptive language. (T.XV, p. 239).

87. The Lovaas study cited by petitioners which found 47% of the nineteen subjects "indistinguishable" after three years of Lovaas therapy, relied on two criteria for determining whether a student was "indistinguishable": an IQ score in the normal range and the child's placement in a regular education class without assistance. (Pet. Exh. 7, 11, p. 5); (T.X111, p. 186). Eight other students who were not in the best outcome group showed improvement in verbal skills and in reduction of behaviors. (T.XIII, p. 190). Dr. Wynn testified that an IQ score after three years in the program

could be used as a good predictor of the child's school performance. (T.XIII, pp. 238, 239).

88. Based on []'s IQ score and class placement she is not in the Lovaas "best outcome" group and she also has not shown improvement in reduction of negative behaviors during her three and a half years in the program. (Resp. Exh. 61, Pet. Exh. 7, Lovaas Studies, p. 81). In fact her negative behaviors increased over her 3 years in the Lovaas program. Dr. Marcus testified that his review of []'s record's did not reveal evidence of significant progress during the three year period she had been in the Lovaas program. (T.XIX, p. 183).

89. Dr. B.J. Freeman, a professor of Medical Science at the University of California at Los Angeles and an expert in autism, testified that she reviewed []'s records, watched videotapes of [], and observed in the two TEACCH classrooms in the Henderson County schools. (T.XVI, pp. 116-122).

90. Dr. Freeman was involved in diagnosing almost all of the students in the original Lovaas study, has trained in discrete trial methodology, is familiar with the literature on the Lovaas methodology, and has worked with students who have been in the Lovaas program. (T.XVI, pp. 56-62). She testified that the Lovaas methodology remains very experimental and that it is not a good method for teaching students functional language and that its focus on instruction for 40 hours a week or more is too intense for young students. (T.XVI, p. 78).

91. Dr. Freeman stated that she believed the Lovaas program was not appropriate for [] for the 1996-97 school year. She believed that it was time for [] to try new techniques. She recognized, and observed in Laurie McDanel's classroom, that one-on-one discrete trial teaching was utilized with reinforcements (T.XVI, pp. 267-268). She

testified that although it was clear [] developed some skills early in the program, her immediate needs reflected in her evaluations and in the goals agreed to in the IEP in the areas of communication, independence and socialization required a change in program. She stated that it was clear the Lovaas program was not properly addressing these areas of weakness which are the areas of core deficit in autism. (T.XVI, p. 209). Specifically, she pointed to the results of Dr. Boyle's testing which showed significant receptive language difficulties. (Resp. Exh. 61) (T.XVI, pp. 110-114).

92. Dr. Freeman testified that the TEACCH program is considered a model program and has been adopted all over the world. (T.XVI, p. 91). Her experience in observing in TEACCH classrooms is that the TEACCH model provides a structure which allows students to become independent and to develop functional language through a natural language environment. (T.XVI, pp. 84-85). She testified that she observed Ms. McDanel's classroom and observed autistic students being mainstreamed into regular kindergarten and first grade classes. (T.XVI, p. 143). She believed that the regular kindergarten class and Ms. McDanel's class were both appropriate for []. (T.XVI, p. 153-155). Dr. Freeman indicated that she would like to see the amount of one-on-one assistance for [] reduced as quickly as possible so that [] can learn to work independently in more normalized settings. (T.XVI, p. 155).

93. Dr. Marcus and Ms. McDanel testified about the importance of having a teacher with a degree in teaching and specific knowledge of autistic students working with [] because the individual needs to know the continuum of educational steps needed to teach a particular skill. (T.XIX, pp. 153-155) (McDanel, T.X, p. 114). Dr. Wynn testified that despite the fact that students are now staying in the Lovaas program beyond pre-school, her staff does not have training or course work on the standard curriculum for

elementary school grades in terms of teaching reading, math and writing in a sequenced method. (T.XIII, pp. 256-257).

94. Judy Cook testified that the []s in IEP meetings requested that she "guarantee" that [] would not regress with a change of programs. (T.VIII, p. 114). Ms. Cook testified that she did not believe [] would regress in the proposed program but that she could not make a "guarantee" to the parents. (T.VIII, pp. 115-116). Although Dr. Blacher testified that the research showed that students regress with a program change, none of the experts on autism agreed with her. Dr. Freeman testified that she knew of no research which showed such regression. (T.XVI, p. 162). Dr. Shea testified that the IEP itself was structured to facilitate []'s transition from the Lovaas program to the school system environment. (T.XVIII, p. 241-246). As a result, she did not believe [] would regress if enrolled in the Henderson County schools. She noted that [] might forget material that she had memorized in Lovaas therapy which had no functional value, but that regression should not be expected to occur. (T.XVIII, p. 244). Dr. Marcus testified that he would not expect a child to regress simply by moving from one type of program to another. (T.XII, pp. 181-182). He stated that he would expect [] to do well within the TEACCH structure since her testing indicated that she is a visual learner. (T.XIX, pp. 182-183).

95. Petitioner presented evidence supporting the premise that [] is, as all Lovaas trained children are, to be weaned from the Lovaas program as she progresses and achieves independence in group settings. []'s proposed IEP includes the assistance of a one-on-one aide or "shadow" provided by the public school system. []'s assistant needs to be trained in the Lovaas method to assist [] in her transition to the public school system.

Based upon the foregoing Findings of Facts, the undersigned makes the following:

Conclusions of Law

1. The IDEA, 20 U.S.C. § 1400 et seq., is the federal statute governing education of students with disabilities. The federal regulations promulgated under the IDEA are codified at 34 C.F.R. Parts 300 and 301.

2. The controlling state law for students with disabilities is N.C.Gen.Stat. Section 115C Article 9 and the corresponding state regulations including the State Procedures Governing Programs and Services for Students With Special Needs Sections 1501-1541 (1993).

3. [] is a student with a disability for purposes of the IDEA and corresponding State law.

4. Respondent is required under federal and state law to make available special education and related services to [] and to offer her a free appropriate public education as that term is defined under the IDEA, and State Procedures.

5. At its core, the dispute between the parties is a debate over a choice of educational methodology for the teaching of autistic children. The two methods at issue are the Lovaas method and the TEACCH method.

6. It is the province of the school district and local educators, and not that of the courts, to choose sound educational methods when implementing the provisions of IDEA. Bd. of Education v. Rowley, 458 U.S. 176 (1982); Hartmann v. Loudon, 118 F.3d 996 (4th Cir. 1997); Barnett v. Fairfax County Sch. Bd., 927 F.2d 146 (4th Cir. 1991).

7. In the absence of procedural or substantive violations of law, courts will not order school authorities to implement a particular educational method when the school has chosen an appropriate educational method.

8. Respondent has complied with all procedural safeguards required by IDEA.

9. Respondent has implemented the TEACCH model and it is an appropriate program for the education of autistic students.

10. A free appropriate public education, as required by IDEA is one that is "reasonably calculated to allow the child to make reasonable progress."

11. Under North Carolina law, respondent is required to provide petitioner a sound basic education commensurate with that given other students. Leandro v. State of North Carolina, No. 179PA96, 1997 N.C. LEXIS 486 (N.C. July 24, 1997); Harrell v. Wilson County, 58 N.C. 260 (1982); G.S. § 115C et. seq. The state standard for an appropriate education is higher than required by federal law. The State is to ensure that every child receives a "fair and full opportunity to reach his full potential." G.S. § 115C-106. However, this does not mean that a school system must provide utopian educational programs for children with special needs anymore than they are required to provide utopian educational programs for nonhandicapped students. Harrell, supra. Respondent's educational program offered to [] the opportunity to receive a sound basic education commensurate with that given to other autistic students.

12. Respondent's educational program offered to [] during the 1996-97 school year, with one exception, was reasonably calculated to allow [] to make educational progress and to provide [] with a free appropriate public education in compliance with the IDEA and state law. In

order for [] to maximize the opportunity provided to her in the public school system, respondent's educational program for the 1996-97 school year should include a provision that the one-on-one assistant provided by the school system be trained in the Lovaas method to assist [] in her transition to public school.

13. The Lovaas program has been of value to [] during her preschool years. However, this was a choice made by []'s parents just as any parent makes a choice regarding private schooling. The Lovaas program implemented during the 1996-97 school year is not provided in the least restrictive environment and is no longer appropriate to meet []'s needs.

14. When choosing an educational method, the school district may consider as a factor the feasibility of implementing a particular method. Barnett v. Fairfax County Sch. Bd., 927 F.2d 146 (1991). Implementation of the Lovaas method is not feasible and is unduly burdensome on the school system.

15. Petitioners are not entitled to reimbursement for the 1996-97 school year because the educational program offered by respondent is appropriate as defined by IDEA. Burlington School Comm. v. Massachusetts Department of Education, 471 U.S. 359 (1985).

16. Petitioners are not entitled to compensatory education for the 1993-1996 school years because they claim that petitioner received an appropriate education during that time period.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following

Final Decision

1. []'s proposed IEP for the 1996-1997 school year was appropriate; however, in order for the IEP to provide the maximum educational benefit to her, the one-on-one aide should be trained in the Lovaas method (discrete trial method) in order to assist [] in the transition to the public school system and the TEACCH program.

2. This cause is retained for further orders as may be just and proper.

Supreme Court, U.S.
FILED
JUL 23 2001
OFFICE OF THE CLERK

(2)

No. 00-1762

In the

Supreme Court of the United States

CM, *ETC.*, *ET AL*,

Petitioners,

v.

BOARD OF EDUCATION OF HENDERSON COUNTY, *ET AL*,

Respondents.

On Petition For Writ of Certiorari
To The Fourth Circuit Court of Appeals

BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD GRANT A PETITION FOR WRIT OF CERTIORARI REGARDING THE STATE STATUTE OF LIMITATIONS BORROWED BY THE DISTRICT COURT, WHERE THE COURT OF APPEALS RULED THAT SUCH STATUTE OF LIMITATIONS COULD NOT BE APPLIED AGAINST PETITIONERS UNDER THE FACTS IN THESE CASES.

II. WHETHER THE MULTIPLE FEDERAL POLICIES UNDERLYING THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) HAVE BEEN BALANCED CONSISTENT WITH THE ACT, WHEN A STATE LEGISLATURE REQUIRES AN AGGRIEVED PARTY, WHO HAS RECEIVED WRITTEN NOTICE OF A FINAL SPECIAL EDUCATION DECISION MADE BY SCHOOL AUTHORITIES ALONG WITH CLEAR NOTICE OF THE PROCEDURES AND TIME LIMIT FOR CONTESTING THAT DECISION, TO FILE A REQUEST FOR AN ADMINISTRATIVE DUE PROCESS HEARING WITHIN 60 DAYS OF RECEIPT OF SUCH NOTICE IN ORDER TO PRESERVE THE RIGHT TO CONTEST THE DECISION.

LIST OF PARTIES

In the consolidated appeals decided by the Fourth Circuit, the parties were:

Petitioners in this Court

CM, a minor, by and through her parents, JM and EM, and on their own behalf (Plaintiffs-Appellants) in 99-2533

M.E. and P.E., on their behalf and on behalf of their son, C.E. (Plaintiffs-Appellants) in 00-1101

Respondents in this Court

The Board of Education of Henderson County *et al.* (Defendants-Appellees) and The State of North Carolina (Intervenor-Appellee) in 99-2533

The Buncombe County Board of Education (Defendant-Appellee) and The State of North Carolina (Intervenor-Appellee) in 00-1101

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I. PETITIONERS ARE NOT AGGRIEVED, FOR THE REASON THAT THE CHALLENGED STATUTE WAS NOT APPLIED TO THEM. 12

II. THERE IS NO CONFLICT IN THE CIRCUIT OPINIONS AND THE CHALLENGED STATUTE COMPORTS WITH EXISTING LAW AND POLICIES UNDER IDEA. 15

A. The Fourth Circuit's ruling is not in conflict with *Birmingham v. Omaha School District*, 220 F.3d 850 (8th Cir. 2000), or with any relevant decision of this Court 15

1. Unlike *Birmingham*, these cases concern the time period for initiation of an administrative hearing 15

2. Unlike the procedures of the shorter Arkansas statute rejected by the Eighth Circuit Court of Appeals in *Birmingham*, the standard of review, scope of review and evidentiary procedures for a due process hearing in North Carolina are all consistent with IDEA 16

B. The Fourth Circuit's ruling is consistent with the decisions from many other federal courts analyzing fundamental IDEA policies. 20

C. The Fourth Circuit's ruling properly considers and attempts to account for all relevant federal policies, rather than one single policy 22

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Board of Education of Henderson County, Buncombe County Board of Education, and The State of North Carolina respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is reported at 241 F.3d 374 and is reprinted in Petitioners' Appendix at A-1 through A-29. The opinion of the district court in *CM v. Board of Educ. of Henderson County* is reported at 85 F. Supp. 2d 574 (W.D.N.C. 1999) and is reprinted in Petitioners' Appendix at A-30 through A-70. The opinion of the district court in *M.E. v. Buncombe County Bd. of Educ.* is reported at 88 F. Supp. 2d 493 (W.D.N.C. 1999) and is reprinted in Respondents' Appendix at 1a through 14a. The opinion of the Administrative Law Judge in *CM* is unpublished and is reprinted in Petitioners' Appendix at A-71 through A-106. The opinion of the Administrative Law Judge in *M.E.* is unpublished and is reprinted in Respondents' Appendix at 15a through 25a. The unpublished hearing review officers' decisions in both cases are reprinted in Respondents' Appendix at 27a through 83a.

STATEMENT OF THE CASES

A. Factual and Administrative Background of *CM*

CM was diagnosed with autism at approximately age two. In June 1993, when CM was three years old, her parents moved the family to Hendersonville, North Carolina to take advantage of services from "TEACCH" (Treatment and Education of Autistic and Related Communication in Handicapped Children) -- a nationally renowned program for autistic students and their families developed at the University of North Carolina. In August 1993, the parents enrolled CM in a TEACCH preschool classroom in the Henderson County Schools.

CM's individualized education program (IEP) developed by the parents and school staff called for a full-day program; however, her parents only brought CM for half a day for the brief time she was enrolled in the TEACCH preschool. At this same time the parents read about the Lovaas program, a treatment approach that professes to achieve "recovery" from autism. The Lovaas program involves highly regimented one-on-one instruction in the home for 40 hours per week. In November 1993, the parents removed CM from the Henderson County Schools to begin Lovaas treatment. They did not express discontent with the TEACCH program or indicate that the school system program was not appropriate, but stated they believed that the Lovaas approach was highly successful.

Over a year later, in December 1994, CM's father contacted school personnel to request that the school system begin paying for the home-based Lovaas program. Since the school system had not worked with CM for over a year and her IEP was now out of date, federal law required that an IEP team be convened to develop a new plan and decide the appropriate placement for CM. A series of

meetings was held over the next two months with a final IEP meeting on February 15, 1995. The IEP team considered four options: the parents' program and three different school-based programs. With the exception of the parents, the IEP team recommended that CM be served in a full-day program for autistic students with some mainstreaming in a regular kindergarten class. The parents continued to insist upon reimbursement for their Lovaas program.

The Director of Exceptional Children's Programs sent the parents a letter the day after the final IEP meeting. She acknowledged the disagreement between the parties and detailed the rationale for the team's decision. She also enclosed a *Handbook on Parents' Rights* which details the process for challenging the IEP team decision, including a clear statement of the 60-day statute of limitations for initiating a "due process" hearing. The Director explained that the parents could seek mediation or pursue a due process hearing in light of their disagreement with the school system's offer of services.

The parents initially requested mediation but later declined to schedule it. They also did not pursue a due process hearing. They did request an independent evaluation at school system expense. The Director proposed that the school system perform an evaluation first and explained that the parents would be entitled to an independent evaluation if they disagreed with the results.

The school evaluation was completed and reviewed with the parents in October 1995. At the school system's initiative, the parents and school met in November 1995 to begin developing an IEP to replace the one that would soon expire in January 1996. The parents' Lovaas consultant reviewed the IEP drafted by the school staff based on the recent evaluation results. The consultant reported

that CM had already mastered many of the goals and objectives proposed in the IEP. This claim was not supported by CM's recent testing, however.

In December 1995, the parents renewed their request for an independent educational evaluation, stating that the evaluation conducted by school personnel was insufficient. The Director agreed that the parents could pursue an independent evaluation and they would be reimbursed up to $1200 (the school system's maximum amount for independent evaluations). School personnel and the parents agreed to postpone the development of the 1996-97 IEP until the independent evaluation was completed.

After rejecting all of the independent evaluators on the school system's list, in the spring of 1996, the parents selected Dr. Jan Handleman, an educator and professor with Lovaas experience in New Jersey. Dr. Handleman conducted no formal testing of CM. Because Dr. Handleman's report provided no information on CM's present level of educational performance -- a necessary element for the development of an IEP -- and because the parents and their Lovaas consultant had both indicated that CM had mastered many of the goals and objectives on the proposed IEP, the Director sought the assistance of Dr. Victoria Shea, an expert in autism, to informally assess CM in order to provide information for IEP development.

Dr. Shea completed her observation report in May and recommended that IEP goals be written in several specific areas. She found that the skills CM had "mastered," according to her parents and Lovaas consultant, had not been mastered in the school environment. Due to the conflicting statements regarding CM's present level of performance, school personnel conducted additional observations and informal assessments, and met again with CM's

mother in an effort to gather more information about CM's present level of performance prior to the development of the IEP.

The parents postponed an IEP meeting scheduled for June, because they would not grant permission to school personnel to conduct the testing recommended by Dr. Shea. They chose to have the testing administered privately by Dr. Thomas Boyle, a private psychologist in New Jersey who had worked with Dr. Lovaas. Dr. Boyle admitted that he deviated from standard protocol in administering the tests in order to try to elicit a response from CM. Dr. Boyle conducted an intelligence test of CM but, at the parents' request and contrary to his normal practice, he did not report the score. At the hearing it was revealed that after over two years of Lovaas therapy CM scored in the mildly mentally handicapped range. According to the Lovaas study one criterion for "recovery" is achieving an IQ in the normal range after two to three years in the program. In the summer of 1996 CM was not showing signs of "recovery."

School personnel and the parents met in August 1996 to begin developing the IEP based on the evaluation reports, the observations, and the parents' input regarding CM's progress in her home program. A subsequent IEP meeting was held in mid-September at the parents' request so that their Lovaas consultant could attend. Although the parents and consultant did not reveal this during the IEP meetings, at this time CM was displaying significant aggressive behaviors at home in addition to at school. Also the home logs revealed the mother's concern that CM had "forgotten a lot of information. Much of what she learned was never generalized completely." In addition, a questionnaire completed by CM's preschool teachers at the mother's request showed that many of the skills that the Lovaas therapist claimed CM had mastered in

December 1995 were still a problem for CM at the end of the 1995-96 school year.

At a final IEP meeting on September 23, 1996, the parents and school personnel all agreed that the goals and objectives on the IEP were appropriate. The parents continued to request that the school system pay for their home Lovaas program. Both parents testified that the only program they would have accepted for CM was the Lovaas program. School personnel considered the parents' request but believed that the school system's proposed program was more appropriate. The school staff were concerned that the home program was too intensive, requiring that CM undergo therapy for more than 40 hours a week. They also believed that the constant one-on-one instruction caused CM to become too dependent on adults and that CM's social and communication skills were not being effectively developed.

Petitioners filed a petition for a contested case in the Office of Administrative Hearings on November 1, 1996, claiming that Respondent Henderson County Board of Education (HCBE), violated the requirements of IDEA, by failing to offer an appropriate educational program to CM from November 1993 to the present. Petitioners sought reimbursement for the cost of their in-home program and part-time private school services provided to CM from November 1993 through the 1996-97 school year.

The administrative law judge (ALJ) granted Respondent's motion for summary judgment on all of Petitioners' procedural and substantive claims prior to the development of the 1996-97 IEP based on a failure to file these claims within the statutory limit and laches. An 18-day trial was conducted before another ALJ in the spring of 1997. The judge entered a final decision on December 11,

1997, concluding that HCBE's proposed IEP for 1996-97 was appropriate.

Petitioners appealed to the State Review Officer (SRO). The SRO entered a decision on March 4, 1998, concluding that the Henderson County Schools had offered CM a free and appropriate public education and affirming all prior decisions of the ALJs.

B. Disposition of *CM* in the District Court

On April 3, 1998, Petitioners filed a 50-page complaint in federal district court seeking to overturn the decisions of the ALJ and SRO and claiming violations of the Americans with Disabilities Act (ADA), § 504 of the Rehabilitation Act and § 1983 of the Civil Rights Act and seeking a review of the educational programs for the 1997-98 and 1998-99 school years.

The district court dismissed Petitioners' entire complaint in an Order dated January 4, 1999. However, after reconsideration and by Order dated March 9, 1999, the Court *sua sponte* vacated the January 4, 1999 decision as erroneous as a matter of law and established a timetable leading to a plenary hearing on May 14, 1999, at which the parties were given an opportunity to address all pre-trial motions before the Court.

On June 15, 1999, the district court entered a new Order dismissing: Petitioners' claims under § 504, the ADA and § 1983; all Petitioners' claims against individual defendants; and Petitioners' IDEA claims for the 1997-98 and 1998-99 school years. The court also affirmed the decisions of the ALJ to dismiss the IDEA claims for the 1993-94, 1994-95, and 1995-96 school years.

The district court entered a final Order on October 12, 1999, dismissing Petitioners' only remaining claim, the IDEA claim regarding the 1996-97 school year. In this October 12, 1999 Order, the court affirmed the decisions of the ALJ and SRO, concluded that HCBE offered CM a free appropriate public education for the 1996-97 school year, and dismissed Petitioners' entire complaint with prejudice.

C. Factual and Administrative Background of *M.E.*

P.E. and M.E. moved to Buncombe County, North Carolina in 1995. However, they did not inform the school system that they were residing within the system until March 1, 1996. In order to continue C.E.'s Lovaas therapy, a therapist from Baltimore, Maryland accompanied the family to Buncombe County. C.E.'s therapy was administered by the therapist for 30 to 35 hours a week, 50 weeks a year.

In his first correspondence with Respondent Buncombe County Board of Education ("Buncombe County Schools" and "school system"), P.E., the father of C.E. and the attorney of record in the administrative proceedings below, did not request special education services for C.E. Instead, P.E. requested "reimbursement" for on-going therapy services. The Buncombe County Schools treated P.E.'s initial letter as a referral for special education services.

Over the next year and a half, Buncombe County Schools offered P.E. and M.E. numerous individualized education plans for C.E. In May of 1996, the school system offered a program of at least 20 hours per week of direct special education including one-on-one instruction. Yet, the only program acceptable to the Petitioners was Lovaas. In fact, M.E. stated that she would reject a program

with a comparable amount of in-home, one-on-one instruction based on the TEACCH method.

In February of 1997, school officials wrote to the parents asking them to notify Buncombe County Schools if the individualized education plan already given for C.E. was acceptable because additional personnel would be needed to implement the program. The parents never responded and no negotiations between the parents and Buncombe County Schools regarding services took place after February of 1997.

On June 12, 1997, C.E.'s IEP team determined that he no longer qualified for services. Team members and M.E. and P.E. agreed with the decision and another attorney who accompanied the parents to the meeting was given a copy of the *Handbook on Parents' Rights* containing notice of North Carolina's 60-day statute of limitations for filing due process petitions in the Office of Administrative Hearings (OAH). Although the parents later alleged C.E. was denied an appropriate education from March of 1996 until June of 1997, they never instituted proceedings to challenge the school system's proposed program during the time period when C.E. was eligible to receive services.

On July 29, 1997, P.E. wrote the school system another letter demanding reimbursement for the cost of C.E.'s therapy. He concluded, "[i]f you have not provided a written response to me within ten days from the date of this letter, we will immediately proceed to a due process hearing." In response, the attorney for Buncombe County Schools wrote to P.E. on two separate occasions: on August 7, 1997 to inform P.E. of changes in the notice requirements to schools under IDEA, and on August 8, 1997 to make a counteroffer thereby rejecting the July 29, 1997 demand. P.E. never responded to the August 8, 1997 letter and he filed for due

process on April 22, 1998, 257 days after his settlement demand had been rejected. To file the petition on behalf of C.E., P.E. completed a one-page form provided by OAH and attached a copy of his July 27, 1997 letter.

As of the August 8, 1997 date of the school system's rejection of his demand, P.E. had actual knowledge of North Carolina's 60-day statute of limitations for filing due process petitions under IDEA. P.E. is the attorney of record in the *CM* case, and by order dated March 24, 1997, the ALJ in that case dismissed certain claims asserted by the parents for failure to meet the 60-day statute of limitations. Following a hearing on the school system's motion for summary judgment, the ALJ in *M.E.* ruled that P.E. had actual knowledge and written notice of the 60-day time limit and failed to comply. The ALJ dismissed the petition in its entirety. Remarkably, in the parents' principal brief before the Fourth Circuit, P.E.'s attorney represented to the court that if M.E. and P.E. had known about the 60-day statute P.E. would have filed within the time allowed.

D. Disposition of *M.E.* in the District Court

On December 17, 1999, the district court issued its opinion in *M.E.* on cross motions for summary judgment and dismissed the action due to the parents' failure to file their original petition in the first-tier state administrative process under IDEA within the prescribed time limit. In the district court action, the only factual issue for resolution was whether the parents had timely filed for due process.

After ruling that the petition was not timely filed, the court discussed the parents' argument that a 60-day statute of limitations is too short and conflicts with the purposes underlying the IDEA.

Since IDEA does not contain a statute of limitations, the court ruled that the 60-day statute applied by the ALJ was the most analogous State statute. The court then ruled that application of the statute did not conflict with the purposes underlying IDEA and that a 60-day filing period is not so prohibitively short within the context of administrative due process that it undermines the ability of parents to protect their disabled children's educational rights. Moreover, school systems do have a legitimate interest in the speedy resolution of disputes in order to ascertain the necessary expenditure of funds for all students. Although not dispositive, the court stated that the father, P.E., was an attorney who purported to specialize in education law and the parents were represented throughout the entire proceedings, including negotiations for services and settlement discussions. Finally, the district court held that dismissal was within the discretion of the ALJ because Congress left to the States the procedural mechanism for compliance with IDEA.

E. Decision of the Fourth Circuit Court of Appeals

Both sets of Petitioners appealed to the Fourth Circuit. On June 13, 2000, the court granted the motion of The State of North Carolina to intervene in *M.E.* On June 14, 2000, the court granted the motion of The State of North Carolina to intervene in *CM*. On July 11, 2000, the Fourth Circuit Court of Appeals set the instant cases for oral argument *in seriatim* and on December 22, 2000, the court consolidated the cases for further action.

In a single opinion issued on February 21, 2001, a Fourth Circuit panel held that the 60-day statute of limitations borrowed by the district court was consistent with the federal policies behind the IDEA and did not frustrate its goals. However, the court found in favor of these Petitioners and ruled that neither set of them had been

properly notified of a final decision by the school system rejecting their requests for reimbursement. Therefore, the 60-day statute of limitations at issue had not been triggered and did not apply to either case. The Court of Appeals remanded the case for further proceedings consistent with its holding. Rather than take advantage of the decision in their favor and have their cases heard on remand, Petitioners petitioned this Court for certiorari on an issue which is not in controversy in these cases and has no bearing on their ability to have their cases decided on the merits.

REASONS WHY THE PETITION SHOULD BE DENIED

The Court should deny the Petition for a Writ of Certiorari because there is no case or controversy involving these Petitioners at this time. The court below did not apply North Carolina's statute of limitations against Petitioners based on its strict application of State notice requirements. Thus, these Petitioners are not aggrieved. In the alternative, review by this Court is not warranted on the basis of a purported split in authority. The Fourth Circuit's ruling is not in conflict with the Eighth Circuit's decision, the only case cited by Petitioners for this proposition. Nor is the ruling in conflict with any relevant decisions of this Court or with federal IDEA policy. As the Fourth Circuit's ruling was proper in all respects, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

I. PETITIONERS ARE NOT AGGRIEVED, FOR THE REASON THAT THE CHALLENGED STATUTE WAS NOT APPLIED TO THEM.

Article III of the United States Constitution requires that the jurisdiction of the United States Supreme Court be limited to actual

cases or controversies. U.S. CONST. art. III, § 2. Article III further denies federal courts the "power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413, 415 (1971). Additonally, this Court has offered that in order to meet the case or controversy requirement of Article III, the party invoking the jurisdiction of this Court must have standing to bring the matter before the Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351, 363-64 (1992).

There are three elements an aggrieved party must meet to establish the minimum constitutional standing requirements:

> First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-61, 112 S. Ct. at 2136, 119 L. Ed. 2d at 364 (citations omitted). A party seeking remedial action from this Court must have suffered the specific injury he seeks to have redressed by this Court. *See Virginia v. American Bookseller's Ass'n, Inc.*, 484 U.S. 383, 392, 108 S. Ct. 636, 642, 98 L. Ed. 2d 782, 793 (1988).

As a result of the Fourth Circuit's conclusion that the Petitioners in both cases were not properly notified of the school

system's conclusive decision regarding reimbursement of educational expenses, the 60-day statute of limitations does not bar Petitioners from litigating the merits of their case in the proper federal district court or administrative forum. In light of this holding Petitioners are now free to bring their claims for reimbursement, thereby ensuring that they have their cases heard on the merits. With this procedural bar removed, Petitioners cannot now argue that they have sustained a concrete and particularized harm as a result of the 60-day statute of limitations period. There is no form of redress that this Court may now provide to Petitioners that they have not already received from the Fourth Circuit Court of Appeals.

If this Court were to render an opinion in this matter, despite the fact that these Petitioners have not sustained an injury in fact, it would be an advisory opinion. This Court has made it clear that a request for an advisory opinion from a federal court, such as Petitioners make to this Court, does not present a justiciable issue. In *Barr v. Matteo,* 355 U.S. 171, 78 S. Ct. 204, 2 L. Ed. 2d 179 (1957), the Court stated:

> [A]n advisory opinion cannot be extracted from a federal court by agreement of the parties, . . . and no matter how much they may favor the settlement of an important question of constitutional law, broad considerations of appropriate exercise of judicial power prevent such determinations **unless actually compelled by the litigation before the Court.** . . . Many of the same reasons are present which impel them to abstain from adjudicating constitutional claims against a statute **before it effectively and presently impinges** on such claims.

Id. at 172, 78 S. Ct. at 205-06, 2 L. Ed. 2d at 181 (emphasis added) (citations omitted) (internal quotation marks omitted) (citing *Eccles*

v. Peoples Bank, 333 U.S. 426, 432, 68 S. Ct. 641, 645, 92 L. Ed. 784, 789 (1948)). Because there is no actual live controversy or an injury in fact arising from the 60-day statute of limitations, the Petition should be denied.

II. THERE IS NO CONFLICT IN THE CIRCUIT OPINIONS AND THE CHALLENGED STATUTE COMPORTS WITH EXISTING LAW AND POLICIES UNDER IDEA.

A. The Fourth Circuit's ruling is not in conflict with *Birmingham by Birmingham v. Omaha School District*, 220 F.3d 850 (8th Cir. 2000), or with any relevant decision of this Court.

1. Unlike *Birmingham*, these cases concern the time period for initiation of an administrative hearing.

The filing period at issue here is the time for initiating an administrative due process hearing. In these cases, the court upheld the limitations period specifically adopted by the North Carolina General Assembly for the initiation of due process before the State's Office of Administrative Hearings (OAH) pursuant to IDEA. The "petition" required to begin due process in North Carolina is a one-page document that can be mailed to OAH. IDEA requires the States to provide such a hearing for parents who disagree with a school decision about a child's special education. 20 U.S.C. § 1415(f).[1] The Eighth Circuit's opinion in *Birmingham*, on the other hand, established the appropriate limitations period for filing of

[1] All reference to IDEA in this Brief are to the reauthorized Act of 1997.

original action in federal district court in Arkansas *following* the exhaustion of State administrative remedies. 20 U.S.C. § 1415(i)(2).

Since Congress has elected in IDEA not to legislate the time limit for either type of filing, it is not surprising that, when looking to the procedural law in the various states for the most analogous State statutes of limitation, federal courts have borrowed limitations periods of different lengths. It is likewise unremarkable, let alone indicative of a circuit conflict, that limitations period borrowed by the Fourth Circuit for an administrative hearing in North Carolina differs in length from a limitations period borrowed by the Eighth Circuit for a judicial filing in Arkansas. Such differences exist whenever federal courts must "borrow" from analogous State procedures, given the variety among the States. As in the present case, such differences usually do not reflect actual conflicts.

2. Unlike the procedures of the shorter Arkansas statute rejected by the Eighth Circuit Court of Appeals in *Birmingham*, the standard of review, scope of review and evidentiary procedures for a due process hearing in North Carolina are all consistent with IDEA.

The issues for due process under North Carolina law are: 1) the identification of a child with special needs; 2) the appropriateness of an IEP; 3) the implementation of an IEP; and 4) all other issues relating to whether or not the child is receiving a free, appropriate education. N.C.G.S. § 115C-116(c).[2] Discovery is

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[2] All references to the North Carolina General Statutes are to the 2000 compilation of the State code. The 60-day statute of limitations in its

permitted prior to a hearing on the merits, and the ALJ rules on all issues without limitation. N.C.G.S. § 115C-116(c) and § 150B-28. The scope of review for due process under North Carolina law and is *de novo*.

The Eighth Circuit panel in *Birmingham* rejected a 30-day statute of limitations for judicial review borrowed by the lower court from the Arkansas Administrative Procedures Act because the "AAPA is not closely analogous to the IDEA." Unlike North Carolina law pertaining to administrative actions pursuant to IDEA, review under the Arkansas APA is limited to a review of the agency record without additional discovery, and the relief available is limited to affirming, reversing or modifying the State agency's actions. *Birmingham*, 220 F.3d at 854.

The North Carolina Administrative Procedure Act (APA) establishes a 60-day statute of limitations for contested case filings by aggrieved parties receiving notice of an agency decision and written notice of that time limit. N.C.G.S. § 150B-23(f). The North Carolina General Assembly has expressly adopted this statute of limitations for disputes regarding the provision of educational services to students with disabilities. N.C.G.S. § 115C-116(d). The Fourth Circuit upheld that limitations period, emphasizing that North Carolina "courts would not countenance any departure from, or relaxation of, statutory [notice] requirements." Pet. App. at 20.

The current version of the North Carolina APA contains one basic statute of limitations: "Unless another statute or **federal statute** or **regulation** sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days." N.C.G.S.

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present form has applied in North Carolina for more than 10 years.

§ 150B-23(f) (emphasis added).[3] Thus, if IDEA contained a limitations period for due process filings, North Carolina would use that period. In enacting the IDEA, however, Congress elected to be silent on the issue. In fact, Congress explicitly delegated to states the obligation to develop an administrative hearing process and submit a compliance plan to the Department of Education for approval. North Carolina, unlike many other states, has adopted a directly applicable statute of limitations for IDEA administrative claims pursuant to its delegated authority from Congress and under the supervision of the federal agency charged with monitoring dtate compliance with federal law.[4]

That IDEA does not contain a statute of limitations, 20 U.S.C. § 1415(e)(2), is not unusual. "Congress not infrequently fails to supply an express statute of limitations when it creates a federal cause of action. When that occurs, '[w]e have generally concluded

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[3] Respondents note that the North Carolina 60-day statute is **longer** than many limitation periods now engrafted onto the IDEA by federal case law from those (see cases in note 3). In addition, other grievants in N.C. administrative proceedings have **shorter** time limits for filing contested cases. For example, personnel and employment-related contested cases heard in the Office of Administrative Hearings have a 30-day statute of limitations. N.C.G.S. § 126-38 (applying to career employees) and § 126-7.2 (applying to non-career employees and applicants). This 30-day limit also applies to certain cases involving disability discrimination in employment, *e.g.*, N.C.G.S. §§ 126-34.1(a)(2), -34.1(b)(3), -36.

[4] *Compare* 20 U.S.C. § 1412(a) (stating that "[a] state is eligible for assistance under this part for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets" *with* § 1415(f) "Impartial Due Process Hearing" (requiring that parents "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, **as determined by State law or by the State educational agency.**") (emphasis added).

that Congress intended that the courts apply the most closely analogous statute of limitations under state law.'" *Reed v. United Transp. Union*, 488 U.S. 319, 323, 109 S. Ct. 621, 625, 102 L. Ed. 2d 665, 673-74 (1989) (citation omitted). In the context of IDEA actions, courts have stressed that borrowing a limitations period is mandatory. "[F]ederal courts **must** adhere to the 'borrowing' doctrine, which **requires** a federal court to borrow from the state the most analogous state statute of limitation." *Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380, 386 (4th Cir. 2000) (emphasis added).

The Fourth Circuit properly employed a two-step analysis in evaluating the most appropriate statute of limitations for borrowing in this case, with some appropriate deference shown to the State. Pet. App. at 22. Once a court has selected the most closely analogous state cause of action, the second step requires a court to "defer [under principles of federalism] to the state's judgment about how to balance the need to enforce the statute with the need to weed out stale claims, by borrowing the statute of limitations for the most closely analogous state cause of action, unless that statute would frustrate the purposes of the federal statute on which the claim is based." *Aaron v. Brown Group, Inc.*, 80 F.3d 1220, 1223 (8th Cir.), *cert. denied*, 519 U.S. 950, 117 S. Ct. 361, 136 L. Ed. 2d 252 (1996). "[B]y adopting the statute [of limitations] governing an analogous cause of action under state law, **federal law incorporates the State's judgment** on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Janzen v. Knox City Bd. of Educ.*, 790 F.2d 484, 489 (6th Cir. 1986) (emphasis added) (citing *Wilson v. Garcia*, 471 U.S. 261, 271, 105 S. Ct. 1938, 1944, 85 L. Ed. 2d 254, 263 (1985)).

As noted by the Fourth Circuit, "[l]ogic virtually compels the conclusion that a state special education statute, specifically enacted to comply with the IDEA, like N.C. Gen. Stat. § 115C-116, constitutes the state statute most analogous to the IDEA." Pet. App. at 12. That same statute provides to parents a due process hearing on the widest conceivable variety of issues including the identification or misidentification of a child as a child with special needs; the appropriateness of a child's IEP; the failure to implement an IEP; and the denial of an appropriate education. N.C.G.S. § 115C-116(c) and (e). This wide scope of review under North Carolina's statute further distinguishes this case from *Birmingham*, in which the scope of review under Arkansas law.

This case is also distinguishable on the bases of standard of review and evidence before the reviewing administrative officer. Unlike the hearing provided for by the judicial review statute rejected in *Birmingham*, the due process hearing in North Carolina is not only a *de novo* review as to a broad variety of special education issues but it is also a full evidentiary trial. N.C.G.S. §§ 115C-116(d); 150B-25(c) and (d) (opportunity to present evidence, cross-examine any witness, submit rebuttal evidence); 150B-27 (subpoenas of witnesses); 150B-28 (depositions and full discovery under the standard rules of civil procedure); 150B-29 (documentary evidence a part of the record); and 150B-33 (conduct of pre-trial matters and hearings).

B. The Fourth Circuit's ruling is consistent with the decisions from many other federal courts analyzing fundamental IDEA policies.

The Fourth Circuit correctly found North Carolina's scheme consistent with IDEA. Pet. App. at 13-22. North Carolina is in the mainstream in utilizing its own APA as the source of the limitations

period, as is abundantly illustrated by other federal cases. In determining the most analogous limitations period for purposes of filing judicial actions under the IDEA, for example, numerous federal courts similarly "have concluded that the state administrative procedure laws are most analogous to the federal claims possible under IDEA and that the 'short' limitations periods found within such laws are **consistent with the IDEA's goals of prompt resolution** of disputes over the education of children with disabilities."[5] Although the borrowed short time periods for IDEA

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[5] *See, e.g., Birmingham,* 17 F. Supp. 2d at 863 (applying Arkansas' 30-day period) (citing *Cleveland Heights-University Heights City Sch. Dist. v. Boss,* 144 F.3d 391, 396-97 (6th Cir. 1998) (applying Ohio's 45-day statute), *aff'd in part and rev'd in part,* 220 F.3d 850 (2000)(preferring a longer statute under its facts); *Zipperer v. School Bd. of Seminole County,* 111 F.3d 847, 850-52 (11th Cir. 1997) (saying in dicta it would likely adopt 30-day period for appeal in administrative proceedings); *Livingston Sch. Dist. v. Keenan,* 82 F.3d 912, 914-15 (9th Cir. 1996) (applying Montana's 30-day limitation); *Powers v. Indiana Dep't of Educ.,* 61 F.3d 552, 554-59 (7th Cir. 1995) (applying Indiana's 30-day period); *Amann v. Town of Stow,* 991 F.2d 929, 931-34 (1st Cir. 1993) (applying Massachusetts' 30-day limit); and *Adler v. Education Dep't of N.Y.,* 760 F.2d 454, 455-60 (2d Cir. 1985) (applying NY's 120-day statute)). *See also Providence Sch. Dep't v. Ana C.,* 108 F.3d 1 (1st Cir. 1997) (applying Rhode Island's 30-day statute); *Dell v. Board of Educ.,* 32 F. 3d 1053, 1060 (7th Cir. 1994) (applying Illinois 120-day statute); *Spiegler v. District of Columbia,* 866 F.2d 461 (D.C. Cir. 1989) (applying 30-day statute); *Department of Educ. v. Carl D.,* 695 F.2d 1154 (9th Cir. 1983) (30 days); *L.C. and K.C. v. Utah State Bd. of Educ.,* 57 F. Supp. 2d 1214 (D. Utah 1999) (30 days); *Wagner v. Logansport Community Sch. Corp.,* 990 F. Supp. 1099 (N.D. Ind. 1997) (30 days); *Berkowitz by Berkowitz v. New York City Bd. of Educ.,* 921 F. Supp. 963 (E.D.N.Y. 1996) (120 days); *Herbert v. Manchester,* 833 F. Supp. 80 (D.N.H. 1993) (30 days); *Wills v. Ferrandino,* 830 F. Supp. 116 (D. Conn. 1993) (45 days); *Elizabeth K. v. Warrick County,* 795 F. Supp. 881 (S.D. Ind. 1992) (30 days); *Gertel v. School Comm.,* 783 F. Supp. 701 (D. Mass. 1992) (30 days); *I.D. v. Westmoreland Sch. Dist.,* 788 F. Supp. 632 (D.N.H. 1991) (30 days); *Bow Sch. Dist. v. Quentin W.,* 750 F. Supp. 546 (D.N.H. 1990) (same); *Thomas v. Staats,* 633 F. Supp. 797 (S.D. W. Va. 1985) (120 days).

filings in court range from 30 to 45 to 120 days (*see* note 5), such inconsistency arises directly from the congressional decision not to legislate a uniform statute of limitations for the IDEA.

Finally, Congress is presumed to be aware of federal case law as it impacts on the interpretation of federal statutes. And in re-authorizing IDEA in 1997, without adding a statute of limitations to the Act, Congress implicitly approved the numerous holdings regarding short statutes of limitations. The courts have also noted that such surface "'inconsistency [is] probably attributable to the fact-based analysis and the variety of state causes of action to evaluate.'" *S.V. v. Sherwood Sch. Dist.*, 75 F. Supp. 2d 1153, 1158 (D. Or. 1999) (quoting *Dreher v. Amphitheater Unified Sch. Dist.*, 22 F.3d 228, 231 n.4 (9th Cir. 1993)).

C. The Fourth Circuit's ruling properly considers and attempts to account for all relevant federal policies, rather than one single policy.

North Carolina's 60-day time period for filing a due process petition is clearly consistent with federal policies under the IDEA, as repeatedly underscored in the case law deemed by the Fourth Circuit to be "[t]he better-reasoned cases." Pet. App. at 16. As observed by the court below, "[t]he Act's intent would obviously be thwarted if placement decisions were not carried out until after a child could benefit from those placements." Pet. App. 13-14.

Petitioners assert that certiorari should be granted "to correct the misapplication of the unconscionably short statute of limitations which clearly undermines the underlying policy of the IDEA." Pet. at 15. First, the Fourth Circuit did not apply the 60-day statute in these cases (*see* Argument I). Second, there is no single policy

underlying IDEA, and the various policies are in some tension. The Fourth Circuit's opinion scrupulously examined the important interests served by IDEA, Pet. App. at 13-16, as well as the resulting policy tensions, and correctly concluded on balance that North Carolina's due process scheme is consistent with the IDEA.

Some cases, it is true, emphasize promptness in decision-making as the paramount consideration in selecting the most analogous limitations period. There is virtue in that emphasis, as long as it is understood to be non-exclusive. Promptness is indeed important, as recognized by the Seventh Circuit:

> [T]o succeed in safeguarding the student, the IDEA's policies encourage the **prompt,** rather than protracted, resolution of disputes concerning the disabled student's education. *See* 121 Cong. Rec. 37416, 94th Cong., 1st Sess. (Nov. 19, 1975) (statement in final Senate debate by Senator Williams, the principal author of the bill, stating that delay in resolving education matters is detrimental to the development of a handicapped child). The statute establishes **expeditious** administrative reviews: a due process hearing conducted within 45 days of the request, and a review of that decision within 30 days of the request. *See* § 1415(b) & (c); 34 C.F.R. § 300.512(a) & (b). . . . Moreover, because delay in the resolution of any proceedings brought under § 1415 can delay a change in the child's educational program, *see* 20 U.S.C. § 1415(e)(3), n 17, a **short limitations period is consistent** with the **IDEA's goal of prompt resolution of disputes and proper placement** of the child.
>
> . . . Congress quite clearly intended that "**all hearings and reviews** conducted pursuant to [the IDEA] **be**

> **commenced** and disposed of as **quickly** as practicable." 121 Cong. Rec. 37416 (1975) (statement of the legislation's principal author, Senator Williams). The IDEA clearly reflects a goal of **avoiding delay** in resolving education questions and in meeting the educational needs of the disabled child.

Dell v. Board of Educ., 32 F.3d 1053, 1060 (7th Cir. 1994) (emphasis added).

One reservation about borrowing "short" statutes of limitations which appears in a handful of IDEA cases is a concern that unrepresented parties might be disadvantaged or otherwise unprotected against default on the ground of a procedural technicality such as a short limitations period of which they "may be unaware." *Schimmel v. Spillane*, 819 F.2d 477, 482 (4th Cir. 1987) (adding that it was "not clear" to the court, from its reading of the predecessor statute to IDEA, that the Act imposed a duty to give notice to parents of the applicable statute of limitations). However, in North Carolina the 60-day limitation period only applies if the grievant is given written notice thereof. N.C.G.S. § 150B-23(f). And, finding that Petitioners did not have such notice, the Fourth Circuit held this statute of limitations could not be invoked against them under the facts in these two cases. Pet. App. at 29.

Other cases evincing concern over a short limitations period have stressed another federal policy, that of parent participation in educational planning. Nothing about North Carolina's 60-day limitations impedes that important participation or a parent's right to contest **any** school decision regarding identification, the appropriateness of an IEP, the implementation of an IEP or an educational program, made at any stage in the process of evaluating, determining eligibility, developing IEPs, placing the child, or reviewing problems with services for the child as they arise.

Parents themselves must recognize the importance of providing the earliest possible, undelayed services to children with special needs, which is a clear theme in the congressional history. *See, e.g.*, remarks of Senator Schweiker ("much more could be done at an earlier age to ameliorate, alter, or develop skills to compensate for, certain handicapping conditions") at 121 Cong. Rec. 19504 (June 1975). By means of its 60-day statute, the State of North Carolina has made the considered judgment that disabled children's education rights are best protected when decisions are made as promptly as possible with respect to the appropriateness of an IEP offered by a school district. That judgment is supportable because IDEA is, when all is said and done, most about the proper educational placement of each eligible child.

A shorter limitations period clearly serves the goal of resolving disputes "while a remedy is still available" within the school district's purview and before the child might lose ground. *Gertel v. School Comm. of Brookline Sch. Dist.*, 783 F. Supp. 701, 706 (D. Mass. 1992). "The Act's requirement of periodic and individualized assessments of each handicapped child evinces a recognition that children, particularly young children, develop quickly and that a placement decision that may have been appropriate a year [or less] ago may no longer be appropriate today." *Spiegler v. District of Columbia*, 866 F.2d 461, 466 (D.C. Cir. 1989).

D. There is no conflict with OSEP's letter rulings.

Petitioners take the further position that it is "significant" that OSEP "has also twice ruled that a 60 day statute of limitations is unenforceable under the IDEA." Pet. at 12. Those short letter rulings, commenting on proposed state legislation in two states, are inapposite. Petitioners' argument disregards the salient differences

between the facts responded to in the Raskin and Pawlisch letters, implicating a one-time, absolute and close-ended 60-day period, and the facts in Petitioners' cases, implicating no such restrictions.[6] A second problem is that the 1991 OSEP letter, on which the 1997

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[6] The Raskin letter (1991) (*see* Respondents' Appendix at 85a) commented on proposed legislation in New Hampshire which would have **limited** any request for due process to the period within 60 days **from "the date parents must sign** the documents indicating their assent to" IEPs. OSERS noted that such a restriction conflicted with IDEA's grant to parents of the right to contest "**any matter** relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to such child." OSERS rightly saw a conflict between the New Hampshire legislation and 20 U.S.C. § 1415(b)(1)(E) and 34 CFR § 300.506 "[s]ince we can envision many situations in which this 60-day limitation would not be reasonable, e.g., problems with the IEP that would not be apparent until much further into the school year."

There is absolutely no such conflict between IDEA, its regulations and the existing statutes in North Carolina, as N.C.G.S.§ 115C-116(c) gives parents the right to obtain review in due process of decisions with which they disagree at any time throughout the year, not just within 60 days of the finalization of a particular IEP. Unlike the proposed New Hampshire legislation, in North Carolina **all** decisions regarding identification, IEP content, IEP implementation, or other denial of appropriate education are grievable under § 115C-116(c), consistent with IDEA. The 60-day period begins to run anew in North Carolina **at any time** the district makes a final decision with which the parents disagree; the 60 days does **not** only begin to run at the time of a meeting for signing the IEP as under the New Hampshire statute.

The Pawlisch letter (1997) (*see* Respondents' Appendix at 89a) commented on proposed legislation in Wisconsin and observed merely that "OSEP previously indicated in a letter to Raskin, OSEP 1991, that a 60-day time limit in filing due process requests which had been proposed in New Hampshire would be an unreasonable limitation upon Federal law." The 1997 letter appears to overlook the peculiar features of the New Hampshire legislation which made it objectionable. In any event, there is nothing about OSEP's comments in either of these letters which suggests that the 60-day limitation as enacted and applied in North Carolina offends federal law or policies; and Petitioners have not shown otherwise.

letter relies without analysis, pre-dates the reauthorized IDEA.

An even more fundamental problem with any argument based on the Raskin and Pawlisch letters, however, is that federal courts do not defer to agency interpretation of federal law when the agency's interpretation would alter the express intent of Congress. *See, e.g., K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 1817, 100 L. Ed. 2d 313, 324 (1988). An agency's interpretive guidance is "not controlling upon the courts by reason of their authority." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49, 58 (1986). Similarly, this Court has quite recently reiterated that an agency's letter ruling "has no claim to judicial deference" under the *Chevron* doctrine, where there is "no indication that Congress intended such a ruling to carry the force of law." *United States v. Mead Corp.*, 533 U.S. ___, ___, 121 S. Ct. 2164, 2168, ___ L. Ed. 2d ___, ___ (2001). Ill-founded or misguided agency notions must, then, yield to the well-grounded and better reasoned contrary judicial interpretation of legislative intent set out in the decision of the Fourth Circuit in these cases.

CONCLUSION

This Petition should be denied for failure to show an actual controversy and injury in fact of these Petitioners, whose cases have both been returned by the Fourth Circuit for trial.

In the alternative, this Court should find there is no conflict between the Fourth Circuit's decision and decisions of other circuits or this Court. The Fourth Circuit correctly decided that North Carolina has properly weighed all the relevant competing policies embodied in IDEA. The Fourth Circuit's ruling, upon a careful balancing of those different policy considerations, is consistent with the congressional goals of: mutual collaboration between schools and parents in the identification and evaluation of children and development of appropriate IEPs; provision of full information about, and preservation of, all procedural rights; and of prompt resolution of disputes regarding IEPs and educational programs, to ensure that young and rapidly developing children with special needs receive their statutorily guaranteed education when they can most benefit from it. Petitioners have not shown otherwise, and no countervailing concerns arise under the facts of this case.

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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July 23, 2001

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA ASHEVILLE DIVISION

CIVIL NO. 1 :99CV3

M.E. and P.E., on their behalf and on behalf of their son, C.E.,	)	
Plaintiffs,	)	
Vs.	)	**MEMORANDUM AND ORDER**
THE BOARD OF EDUCATION FOR BUNCOMBE COUNTY, a/k/a BUNCOMBE COUNTY PUBLIC SCHOOLS,	)	
Defendant.	)	

THIS MATTER is before the Court on the parties' cross motions for summary judgment. For the reasons stated herein, the Court denies the Plaintiffs' motion and grants that of the Defendant.

I. PROCEDURAL HISTORY

ME and PE on behalf of CE, their autistic child, initiated this action pursuant to the Individuals with Disabilities

Education Act (IDEA), 20 U.S.C. §§ 1400, *et. seq.*[1] 20 U.S.C. § 1401 (a)(1)(A)(i). Plaintiffs claimed the Buncombe County Board of Education (County) denied a free appropriate public education (FAPE) to their child, as required by the IDEA. 20 U.S.C. § 1401(a)(18).[2] On October 10, 1998, Administrative Law Judge (ALJ) Beecher Gray found the Plaintiffs had failed to initiate a proceeding for a due process hearing during the 60-day statute of limitations prescribed by the North Carolina Administrative Procedure Act, N.C. (Gen. Stat. § 1 *50B-23.* Plaintiffs filed an administrative appeal and State Review Officer (SRO) J. Sherwood Dunham affirmed the ALJ's decision on December 3, 1998. Having exhausted their administrative remedies, the parents brought this action pursuant to the IDEA. 20 U.S.C. § 1415(e)(2).

II. STANDARD OF REVIEW

Section 1415(e)(2) of Title 20, United States Code, provides in pertinent part that in "any action brought under this [statute] the court shall receive the records of the administrative

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[1] The disorder of autism is defined as a "preoccupation with inner thoughts,...egocentric, subjective thinking lacking objectivity and connection with reality." ***Dorland's Medical Dictionary*** **(28th ed. 1994).**

[2] That section defines the term "free appropriate public education" as "special education and related services that- (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." The parties here have agreed that no hearing is necessary and that the matter may be determined on the basis of the motions.

The Supreme Court has held that a proper review of the state's determination requires a twofold inquiry. ***Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 201 (1982).** The district court must decide: (1) whether the State complied with the IDEA's procedural requirements in developing and implementing the Individualized Education Program (IEP) for the child at issue and (2) whether the IEP is "reasonably calculated" to enable that child to receive educational benefits. ***Id.*, at 206-07.** The Court also instructed reviewing courts to make "independent decision[s] based on a preponderance of the evidence." ***Id.*** The Fourth Circuit refined this standard in *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100 (4th Cir. 1991), where it held that findings of fact by ALJ's and hearing officers in IDEA cases "are entitled to be considered *prima facie* correct, akin to the traditional sense of permitting a result to be based on such fact finding, but not requiring it." ***Id*, at 105.** In essence, district courts must "'make an independent decision based on a preponderance of the evidence, while giving due weight to state administrative proceedings.'" ***Board of Educ. of Montgomery County v. Brett Y*, 155 F.3d 557 (table), 1998 WL 390553 **5 (4th Cir. 1998) (quoting *Doyle*, 953 F.2d at 103).** As to conclusions of law, the determinations made in the

administrative proceedings are reviewed *de novo*. ***Milford Sch. Dist. v. William F.*, 129 F.3d 1252 (table), 1997 WL 696108 (1st Cir. 1997); *Dell v. Bd. of Educ., Township High Sch. Dist.* 113, 32 F.3d 1053, 1058 (7th Cir. 1994).**

III. FINDINGS OF FACT

In August 1995, the Plaintiffs moved from Maryland to North Carolina. **Affidavit of Dr. Jane A. Stephens *contained in* Administrative Record.** In March 1996, PE contacted the County to advise that his four year old son had been diagnosed with autism and to request reimbursement for Lovaas[3] therapy which had been provided for the child in their home for between 35 and 40 hours per week. ***Id.*; Petitioners' First Prehearing Statement, *contained in* Administrative Record.** Dr. Stephens construed the letter as a referral for special education services and initiated the evaluation process, to which the Plaintiffs agreed. **Stephens Affidavit.** The parents signed a consent for the evaluation and were provided with a handbook on parental rights. ***Id.***

On May 31, 1996, a meeting was held with the Plaintiffs at which his proposed placement in a preschool classroom with

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[3] Dr. Ivar Lovaas developed a form of treatment for autistic preschoolers. "Discrete trial teaching (DTT) is one component of the Lovaas type of [applied behavioral analysis] and involves a directive followed rapidly with a consequence based on whether the student gives the correct response." ***TH* v. *Bd. of Educ. of Palatine Community Consol. Sch. Dist. 15*, 55 F.Supp.2d 830 (table), 1999 WL 342317 **14 n.8 (N.D. Ill. 1999).** Lovaas therapy requires one-on-one instruction, often for as much as 40 hours per week.

a TEACCH[4] special education teacher was explained. ***Id.*** The Plaintiffs rejected this placement and opted to continue the Lovaas program in their home. ***Id.*** In June 1996, the County offered to provide Extended School Year services to the child or to provide in-home services three times per week. ***Id.*** These services were also rejected by the Plaintiffs by letter dated July 26, 1996. ***Id.;*** **Petitioners' First Prehearing Statement,** ***supra.*** However, in September 1996, the Plaintiffs elected to receive limited services in the form of one and one-half hours of direct special education and speech therapy. **Stephens Affidavit**.

In October 1996, the Plaintiffs again asked the County to consider funding the child's Lovaas therapy. **Petitioners' First Prehearing Statement.** An IEP meeting was held in early January 1997 at which time the parents presented a draft IEP prepared at a Lovaas institution. ***Id.*** At a meeting held on January 28, 1997, the County proposed its IEP, made minor modifications as requested by the Plaintiffs and asked them to notify the County if the IEP was accepted because it would entail the hiring of additional staff. ***Id.*** In February 1997, the attorney for the County wrote to the Plaintiffs and again asked them to respond if they wished to implement the IEP. ***Id.*** No response was received to this letter. Plaintiffs admit that the IEP was never implemented because they rejected it. ***Id.***

Thereafter, the County sent the Plaintiffs an "Invitation to Conference" letter to discuss whether the child would be placed

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[4] Treatment and Education of Autistic and Related Communication Handicapped Children program.

in kindergarten. **Stephens Affidavit**. The Plaintiffs attended the meeting and asked that the child's record be sealed. ***Id.*** A follow-up meeting was set for June of 1997 at which time it was determined the child no longer needed special education services. ***Id.*** He was removed from the program and the parents were again provided with a copy of the Handbook for Parents' Rights. ***Id.*** On July 29, 1997, the Plaintiffs renewed their request for reimbursement for the Lovaas therapy and threatened to initiate a due process petition in the event a response was not received within ten days. ***Id.*** By letter of August 7, 1997, the County declined to reimburse the Plaintiffs for the full amount demanded and advised that a counteroffer could not be proposed until approval was received from the school board. ***Id.*** The County attorney wrote:

> Your letter states that we must respond to your offer within ten (10) days or you will proceed immediately to due process. You, of course, have the right to file a due process petition at any time, however, the reality of school systems requires that the governing board be consulted and that process takes time. If you proceed to due process, please be aware that the IDEA was reauthorized by Congress in June and the new law contains new notice provisions and provisions regarding attorneys' fees that are now in effect. I am including a copy of the law in order to provide you with notice of these provisions. In addition, the North Carolina General Assembly has amended the mediation provisions of state law and I have included a copy of that legislation.

Exhibit E, *attached to* Stephens Affidavit. The amendment to which the attorney referred concerned new notice provisions for filing a due process petition. The Plaintiffs filed a petition for due process in April 1998. ***Id.***

Stephen Grabenstein represented the Plaintiffs daring an undisclosed portion of these proceedings. He has acknowledged in an affidavit that he attended at least one IEP meeting with the Plaintiffs at which he was provided the Handbook of Parents' Rights. **Second Affidavit of Stephen J. Grabenstein, Esquire, *contained in* Administrative Record.** Inside the front cover of that book was placed an addendum which provided notification that a petition for a due process hearing must be filed within 60 days of written notice of the contested action. ***Id.***

IV. DISCUSSION

The only factual issue for resolution is whether the Plaintiffs have shown by a preponderance of the evidence that their petition for due process was timely filed. The first argument made by the Plaintiffs is that the County waived the 60-day statute of limitations. This argument is based on the language in the County attorney's letter to the effect that the Plaintiffs, "of course, have the right to file a due process petition at any time...." The entirety of the statement which is quoted above shows the attorney was responding to the Plaintiffs' threat to initiate a due process petition within ten days unless they had heard from the County. The attorney explained that the school board would not be able to approve any counteroffer within ten days and proceeded to provide

Plaintiffs with copies of the provisions concerning the filing of due process petitions. Plaintiffs' argument, based on taking the comment out of context, is disingenuous at best and is rejected.

As to the factual issue of whether the petition was filed within 60 days of the August 7, 1997 letter, the undersigned finds the determination of the ALJ and SRO was correct. Thus, the only issue remaining is the legal question of which statute of limitations should be applied. The IDEA provides that parents may request an administrative due process hearing but does not contain a time period within which to do so. **20 U.S.C. § 1415(b)(2).** The Fourth Circuit has determined that the absence of a limitations period in the Act does not mean no limitations period should apply to the IDEA. ***Manning* v. *Fairfax County Sch. Bd.*, 176 F.3d 235, 237 (4th Cir. 1999).** Indeed, when federal law provides no statute of limitations, "'the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim, provided that the application of the state statute would not be inconsistent with underlying federal policies.'" ***Id.* (citing *Schimmel v. Spilane*, 819 F.2d 477, 482-83 (4th Cir. 1987) and quoting *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 240 (1985)).**

Plaintiffs argue that under the holdings of *Manning* and *Schimmel*, the 60-day period provided in the state Administrative Procedures Act is too short and may not be applied. However, Plaintiffs do not state which analogous state limitations period should apply. ***Dell*, 32 F.3d at 1059 ("Notably, however, [the Plaintiffs] do not suggest a**

particular statute more analogous to the IDEA's provisions that the court should borrow. Indeed, had the defendants pressed the point, they might well have been able to prevail solely on the ground that the [Plaintiffs] had waived the use of another statute of limitations by not having suggested affirmatively a particular limitation more appropriate than the one employed by the district court.").

In *Schimmel,* the Fourth Circuit addressed the question of the time within which an action in federal court pursuant to the IDEA should be commenced following the exhaustion of state administrative remedies. The defendant there urged the Circuit to find that Virginia's administrative procedures statute of limitations of 30 days should apply. However, the Circuit noted that many parents are unrepresented during the administrative proceedings and thus may be unable to retain an attorney and make a determination concerning the initiation of a federal action within the 30-day time frame. In response to the defendant's argument that the IDEA requires prompt resolution of such matters, the Court held "the need for speedy resolution of disputes does not outweigh the risk that a very short statute of limitations may deny parties a fair opportunity to obtain judicial review of adverse decisions rendered in administrative due process proceedings." ***Schimmel,* 819 F.2d at 483.**

In *Manning,* the issue was not the time within which to initiate the federal action but, as here, the time within which to petition for a due process hearing. The school did not argue that the Virginia administrative proceedings act applied but instead conceded the one year catch-all statute of limitations applied in

Schimmel was the appropriate one. Plaintiffs, on the other hand, argued that one year was too short a period in which to require parents to petition for a due process hearing and argued for a five year statute of limitations. Thus, the *Manning* court did not address whether the 30 day period in the Virginia administrative procedures act should have been applicable; it made a choice between a one and a five year statute of limitations. "[W]e are of the opinion that the same one-year limitations period is not so prohibitively short in the administrative hearing context that it undermines the IDEA's policy of providing parents an opportunity to protect their disabled children's educational rights." ***Manning*, 176 F.3d at 239.**

Thus, the undersigned rejects the Plaintiffs' argument that the *Manning* decision negates the application of North Carolina's 60-day limitations period pursuant to its Administrative Procedures Act. "A statute of limitations may apply no matter whether proceedings are brought in a judicial forum or in an administrative one." ***Manning*, 176 F.3d at 238.** The issue, then, is whether application of that 60-day period is "so prohibitively short in the administrative hearing context that it undermines the IDEA's policy of providing parents an opportunity to protect their disabled children's educational rights." ***Id.*, at 239.**

Although the *Schimmel* and *Manning* courts did not enumerate the balancing factors to be considered, each appears to have followed the methodology set out in *Amann v. Town of Stow*, 991 F.2d 929, 931-33 (1st Cir. 1993): the limitation

period to be borrowed should be selected after balancing the parental interest in participation, the school's interest in speedy resolution of disputes, and the child's interest in receiving educational entitlement. This case has an unusual posture because the child received the services his parents' deemed necessary; the issue is whether his parents are entitled to reimbursement. Moreover, the Plaintiffs, who rejected each proposed IEP, did not petition for a due process hearing until after the child had been determined to be ineligible for any services. Thus, the child's interest in receiving educational entitlement is not impacted.

However, the undersigned concludes that the school has a legitimate interest in the speedy resolution of disputes. The County on more than one occasion asked the Plaintiffs to advise whether they would accept the proposed IEP because acceptance would necessitate the hiring of additional staff. The inability of the school to ascertain the necessary expenditure of funds for staff impacts more than the Plaintiffs' child.

Moreover, although not dispositive, the parents here are not typical. The child's father is an attorney who purports to specialize in education law. They were represented during the proceedings and their attorney has admitted the receipt of information providing notice of the 60-day deadline. The parents were actively involved in the child's education, to the point of rejecting the IEP and insisting on the therapy of their choice.

It is compelling that this case does not involve the time within which to obtain judicial review of the state administrative proceedings. Although the IDEA instructs states to make a FAPE available, it has left to the states the procedural mechanisms for putting the same in place. It was thus within the ALJ's discretion to dismiss the petition as untimely under the North Carolina APA. ***L. M. v. Brownsburg Community Sch. Corp.*, 28 F.Supp.2d 1107, 1110 (S.D. Ind. 1998).** "Just as all deadlines throughout the administrative process are short, the review of that process also should take place within a short period of time." ***Dell*, 32 F.3d at 1061 (applying Illinois' 120-day time limitation for judicial review of administrative decision to parent's reimbursement claim under the IDEA.).** Thus, application of the North Carolina Administrative Procedures Act 60-day limitation is not inconsistent with the underlying policies of the IDEA.

> The purpose of requesting a due process hearing is to challenge an aspect of a child's education and to put the school district on notice of a perceived problem. Once the school district receives notice, it has the opportunity to address the alleged problem. Under [Plaintiffs'] theory, a school would be potentially liable for unanticipated costs for alleged problems of which it is totally unaware. "Recovery tuition [or costs] is a remedy only if the [FAPE] guarantee has been violated, exhaustive administrative remedies have been tried before placement, and the school has been notified."... While [the Lovaas therapy] may

> have been of great benefit to [the child], we cannot agree that a school district must reimburse a parent for unchecked educational expenses.

***Thompson v. Bd. of Special Sch. Dist. No. 1 (Minneapolis)*, 144 F.3d 574, 579 n. 3 (8th Cir. 1998) (quoting Cindy L. Skaruppa, Ann Boyer & Oliver Edwards, *Tuition Reimbursement for Parent's Unilateral Placement of Students in Private Institutions: Justified or Not?*, 114 Educ. Law Rep. 353, *354* (West 1997)).** The Plaintiffs here seek reimbursement for therapy which they unilaterally chose and implemented during a time when there were no proceedings pending with the County.

> We, of course, recognize that the school district has the duty in the first instance to provide an appropriate IEP, and moreover, to demonstrate by a preponderance at a due process hearing that the IEP it offered was indeed appropriate. With that foremost in mind, we must nevertheless also recognize that as a practical reality, and as a mater of procedural law of which [the child's] parents were fully apprized, the right of review contains a corresponding parental duty to unequivocally place in issue the appropriateness of an IEP. This is accomplished through the initiation of review proceedings within a reasonable time of the unilateral [choice of therapy] for which reimbursement is sought.

Bernardsvile Bd. of Educ. v. J.H., 42 F.3d 149, 158 (3rd Cir. 1994) (footnote omitted); *accord, Lewisville Indep. Sch. DisL v. Brooke P.*, 16 Educ. for the Handicapped Law Rep. 1313, 1315-16 (E.D. Tex. 1990) (parents' failure to request due process hearing constitutes waiver of right to reimbursement for cost of extended school year services prior to initiation of due process proceedings); *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 84 (3rd Cir. 1999). Thus, the undersigned cannot conclude that application of North Carolina's 60-day period is "so prohibitively short in the administrative hearing context that it undermines the IDEA's policy of providing parents an opportunity to protect their disabled children's educational rights." *Manning, supra.*

V. ORDER

IT IS, THEREFORE, ORDERED that the Plaintiffs' motion for summary judgment is hereby **DENIED**; and

IT IS FURTHER ORDERED that the Defendant's motion for summary judgment is hereby **GRANTED.**

A Judgment dismissing this case in its entirety is filed herewith.

THIS the 17th day of December, 1999.

/s/ LACY H. THORNBURG
UNITED STATES DISTRICT COURT
JUDGE

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
FILE NO. 98 EDC 0566

M. E. and her husband, P.E., individually, and on behalf of their son, C. E.,	)	
Petitioners,	)	
vs.	)	**FINAL DECISION**
THE BOARD OF EDUCATION FOR BUNCOMBE COUNTY a/k/a BUNCOMBE COUNTY PUBLIC SCHOOLS, et al	)	
Respondent.	)	

THIS CONTESTED CASE coming on for hearing before the Honorable Beecher R. Gray, Administrative Law Judge Presiding, on Respondent's *Motion for Summary Judgment* on September 14, 1998, in Hendersonville, North Carolina. After reviewing the pleadings, affidavits, and supporting memoranda of law and hearing the oral arguments of counsel, the Undersigned is of the opinion that the Respondent's *Motion* is well-founded in fact and law, and the Undersigned enters the

following Final Decision granting summary judgment in favor of the Respondent, Buncombe County Public Schools.

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ISSUES TO BE RESOLVED ON SUMMARY JUDGMENT

1. Whether the Petitioners' action is time barred by the applicable statute of limitations;

2. If not, whether the Petitioners fail to state a claim for which relief can be granted under the Individuals with Disabilities

Education Act ("IDEA") in that Petitioners sought public funding for a particular educational methodology; and

3. Whether this Court has jurisdiction to hear claims brought pursuant to the United States and North Carolina Constitutions, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Section 1983.

BURDEN OF PROOF

Upon a motion for Summary Judgment the Movant has the burden of establishing that there is no genuine issue as to any material fact and that it is entitled to summary judgment as a matter of law. Once the Movant satisfies its burden, the Non-Movant may not rely on its allegations but must produce a forecast of evidence sufficient to establish the existence of a genuine issue of material fact requiring trial.

Based on the uncontroverted evidence appearing of record, to which consideration may be given under G.S. § 150B-(33)(3a), 26 N.C.A.C. 3 .0101(1) & 3 .0105(6), and G.S. § 1A-1, Rule 56 of the N.C. Rules of Civil Procedure, including pleadings, depositions, answers to interrogatories, together with affidavits, and having considered the legal memoranda and oral argument of counsel for both parties, the Undersigned, Administrative Law Judge Presiding, makes the following:

PROCEDURAL BACKGROUND

1. On August 27, 1998, the Respondent filed its Motion for Summary Judgment with supporting affidavits.

2. On September 2, 1998, the Respondent filed its *Brief in Support of Motion for Summary Judgment.*

3. On or about September 9 - 11, the Petitioners served affidavits and a *Brief* in opposition to Respondent's *Motion.*

4. On Monday, September 14, 1998, the Undersigned conducted an on-the-record hearing in the Henderson County Courthouse, Hendersonville, North Carolina.

5. The venue for this proceeding was suggested by the Petitioners and agreed to by the Respondent.

UNDISPUTED FACTS

1. M.E. and P.E. first presented their son C.E. to the Respondent in March of 1996 ("time of presentment"). At the time of presentment C.E. was four years old and was receiving an in-home program of Lovaas Therapy funded by the Petitioners.

2. On September 22, 1994 and September 23, 1994, C.E. was evaluated at the Kennedy Kreiger Institute and was diagnosed with Pervasive Developmental Disorder, not otherwise specified (PDD/NOS). The Kennedy Kreiger evaluation referred to C.E. as "high functioning".

3. On February 27, 1995, C.E. was evaluated by Division TEACCH in Chapel Hill, North Carolina. TEACCH determined that C.E. met the criteria for Autism.

4. On March 1, 1996, P.E. wrote to the Respondent "requesting reimbursement for CE's program which at that time was being privately funded by CE's family." Petitioners' First Prehearing Statement, Factual Allegations, ¶ 18. The letter describes C.E.'s in-home Lovaas program as "quite expensive to fund privately." Letter dated March 1, 1996, attached to Jane Stephens's Affidavit as Exhibit A.

5. The Respondent accepted P.E.'s letter of March 1, 1996 as a referral for special education and thereafter evaluated C.E., determined the extent of his eligibility for special services, developed numerous Individualized Education Plans (IEPs) for C.E., and offered a placement that it felt was appropriate to meet C.E.'s special needs. Although the Petitioners allege that the Respondent did not offer C.E. a free and appropriate public education, they never instituted proceedings available under the Individuals with Disabilities Education Act and G.S. 115C, Article 9 to challenge the educational program offered by the Respondent during the time period that C.E. was eligible to receive services under IDEA.

6. At the time of this hearing on the Respondent's *Motion*, neither expert witness for the Petitioners had reviewed any of the proposed services offered by the Respondent, and the Petitioners did not present additional affidavits at this hearing from these, or any other experts, opining that the program offered by the Respondent was inappropriate for C.E.

7. At no time did the parents accept the placement offered by the Respondent for C.E. electing to continue with their in-home Lovaas program. The Petitioners never requested that the

school system implement their program but only requested that the Respondent "fund" the Petitioners' program.

8. On October 23, 1996, P.E. wrote the Respondent "in an effort to get [the Respondent] to seriously consider the requests to fund CE's 'Lovaas' program'". Petitioners' First Prehearing Statement, Factual Allegations, ¶ 36. The letter also suggested that the Respondent contact its attorney for advice. Id.

9. On June 12, 1997, the Respondent reevaluated C.E. at the Petitioners request and determined that C.E. was no longer eligible for special education services under IDEA. The Petitioners consented to this decision.

10. On July 29, 1997, Petitioners wrote to the Respondent to "make one final attempt" to convince the Respondent to "reimburse" them for C.E.'s private, in-home Lovaas program provided to C.E. The letter concludes, "If you have not provided a written response to me within ten days from the date of this letter, we will immediately proceed to a due process hearing." Letter dated July 29, 1997 attached to Petition.

11. On August 7, 1997, Counsel for the Respondent wrote to the Petitioners on Respondent's behalf and rejected their request for the Respondent to fully reimburse them for the in-home Lovaas Program. The letter informed the Petitioners that the school system believed that the program offered to C.E. during his period of eligibility provided a free and appropriate public education and Counsel also informed the Petitioners of new notice requirements for filing due process under IDEA and provided them with a copy of the revised law.

12. On August 8, 1997, Counsel for the Respondent again wrote to the Petitioners on Respondent's behalf and again rejected the Petitioners' "final attempt" to receive "reimbursement" and made a counteroffer. The Petitioners never responded to this counteroffer.

13. According to the Affidavit of Petitioner M.E., on a number of occasions the Respondent provided either M.E. or her attorneys with copies of the Handbook on Parents' Rights with "July 1993" stamped on the front cover. The education record of C.E. indicates that either M.E. or P.E. acknowledged receipt of the Handbook on March 25, 1996 and June 12, 1997.

14. The Petitioner P.E. is also an attorney of record in this matter.

15. According to the Amended Affidavit of Jane Stephens, the Handbooks available to parents in 1996 and 1997 were the 1993 revised version and the 1994 version both of which inform parents of the sixty (60) day statute of limitations incorporated by G.S. §115C-116. The 1993 revised Handbook contains an Addendum inside the front cover or title page. That Addendum states as follows:

Addendum to July, 1993 Edition of Handbook on Parents' Rights.

The introduction and Part A of the section entitled "Impartial Due Process Hearing and State Review" (page 12) have been rewritten as follows:

Impartial Due Process Hearing and State Review. A parent or public agency may file a petition for an impartial due process hearing (sometimes called administrative review or contested case hearing) to challenge the identification, evaluation, evaluation, or placement of a child or the provision of a free appropriate public education for the child. This kind of hearing places the responsibility for resolving the conflict on an administrative law judge in the Office of Administrative Hearings, an agency that has no relationship with the education agency or with the State Department of Public Instruction.

A. In order to exercise the right to a due process hearing, the parent must file a petition within 60 days of written notice of the contested action with the Office of Administrative Hearings (424 N. Blount Street, P.O. Drawer 27447, Raleigh, N.C. 27611-7447. For additional information concerning the filing of a petition, parents should contact the Office of Administrative Hearings, telephone 919/733-2698.

16. According to the initial Affidavit of Stephen J. Grabenstein, Attorney for the Petitioners, he was given a copy of the 1993 Handbook at an IEP meeting that he attended on behalf of the Petitioners. The copy of the Handbook attached to the Affidavit did not include the Addendum.

17. According to a subsequent, revised affidavit of Stephen J. Grabenstein, he acknowledged that he received a copy of the 1993 Handbook with the Addendum from the Respondent at an IEP meeting.

18. The Petition in this matter was filed on April 22, 1998, two hundred and fifty-seven (257) days following the Respondent's final rejection of the Petitioners' request for full reimbursement on August 8, 1997.

CONCLUSIONS OF LAW

1. Although he is not held to a higher standard than the Petitioner M.E., the knowledge of facts held by P.E. as attorney is considered knowledge held by P.E. as Petitioner.

2. The Undersigned has jurisdiction over this matter pursuant to Chapter 115C and 150B of the North Carolina General Statutes and 20 U.S.C. § 1400 et. seq., the Individuals with Disabilities Act (IDEA).

3. Pursuant to G.S. §115C-116(c) the Undersigned does not have jurisdiction over Petitioner's claims made pursuant to the United States and North Carolina Constitutions, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Section 1983.

4. Pursuant to 20 U.S.C. §1415 (1997) and 34 C.F.R. §300.504 & §300.505, written notice under IDEA is required only when an agency "proposes to initiate or change; or refuses to initiate or change; the identification, evaluation, or educational placement of the child, . . . or the provision of a free appropriate public education to the child" under the provisions of IDEA.

5. Upon the facts of this case, the Respondent was not required to provide the Petitioners with "prior written notice"

under IDEA in order for the applicable statute of limitations to begin running against Petitioners.

6. The applicable state law, N.C.G.S. §115C-116(d), clearly states that any administrative review shall be initiated and conducted in accordance with Article 3 of Chapter 150B, the Administrative Procedures Act. Applied to this case, §150B-23 of the Act requires that, unless the federal or state law provides otherwise, the limitation for the filing of a petition is within sixty (60) days of notice of the contested action.

7. IDEA does not specify a time limit and G.S. §115C-116 specifically adopts the 60 day limitation. When §115C-116(d) and §150B-23 are read together, it is clear that the North Carolina statutory scheme strikes a necessary balance between the need for speedy resolution of special education disputes and the need to allow the parties a fair opportunity to obtain due process under state and federal law.

8. The Respondent provided the Petitioners with the requisite notice pursuant to §150B-23.

9. The April 22, 1998 Petition filed in this matter is not a timely challenge as to any action taken by the Respondent prior to the sixty (60) days of that date. Giving these Petitioners every reasonable inference from the evidence presented upon Respondent's *Motion for Summary Judgment*, the sixty (60) day statute ran over two hundred days prior to the filing of this Petition.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Respondent's *Motion for Summary Judgment* is hereby GRANTED and the Petition in this matter is hereby dismissed in it's entirety.

NOTICE

In order to appeal this Final Decision, the person seeking review must file a written notice of appeal with the North Carolina Superintendent of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Decision. G.S. §115C-116(h) and (I).

THIS the 30th day of September, 1998.

Beecher R. Gray
Administrative Law Judge Presiding

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STATE OF NORTH CAROLINA

BEFORE A STATE HEARING REVIEW OFFICER FOR THE STATE BOARD OF EDUCATION PURSUANT TO G.S. 115C-116

M.E. AND P.E. ON BEHALF OF THEIR SON C.E., Petitioner	)	
v.	)	**DECISION**
	)	**98 EDC 0566**
THE BOARD OF EDUCATION for Buncombe County a/k/a Buncombe County Public Schools, et al, Respondent	)	

This is an appeal of the following Final Decision, File No. 98 EDC 0566:

The order issued by Administrative Law Judge, Beecher R. Gray granting Summary Judgement in favor of the Respondent, Buncombe County Public Schools, 30 September 1998.

Case Records were received by the Review Officer on November 17, 1998. They included the Official Record, Judge Gray's Final Decision, transcripts of oral arguments, depositions, and numerous documents related to the substance of the contested case. On November 25, 1998, written

arguments were received from the Petitioner and the Respondent.

Having reviewed the records of the case, the Hearing Review Officer for the North Carolina State Board of Education finds the following;

FINDINGS OF FACT

1. A Petition for a Contested Case Hearing was filed on April 22, 1998 by M. E. on behalf of her son C. E. vs. the Buncombe County Board of Education.

2. On August 27, 1998, the Respondent filed a *Motion for Summary Judgement* with supporting affidavits.

3. On September 2, 1998, the Respondent filed its Brief in Support of Motion for Summary Judgement.

4. On or about September 9-11, 1998, the Petitioners filed a Brief with supporting affidavits in opposition to Respondent's Motion.

5. A Hearing was held before Administrative Law Judge, the Honorable Beecher Gray in the Hendersonville County Courthouse, Hendersonville, N. C. on Monday, September 14, 1998.

6. The Hearing was held pursuant to Chapter 115C and 115B of the North Carolina General Statutes, and the Individuals

with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et. seq.

7. The Petitioner for a Contested Case Hearing complained that the, "Respondent failed to provide FAPE."

8. The Respondent's *Brief in Support for Summary Judgement,* argued, in part, "the Petition is untimely."

9. C. E. (hereafter referred to as the child) was born January 10, 1992 in Maryland.

10. M. E. observed that at the age of 18 months the child, "wasn't speaking, he didn't make eye contact... he didn't play with toys."

11. The child was evaluated at the Kennedy Kreiger Institute on September 22, 1994 and September 24, 1994. He was diagnosed with Persuasive Developmental Disorder and evaluated as "high functioning". The child at that time was two and a half years in age.

12. Approximately five months later on February 27, 1995, the child was evaluated at the University of North Carolina, Chapel Hill. The University's Division TEACH concluded that the child suffered from Autism.

13. In August of 1995, the child and his family moved to North Carolina.

14. Before moving to North Carolina, M.E. had investigated the Lovaas program for the treatment of Autism, and had initiated the child's Lovaas therapy in early 1995.

15. On March 1, 1996, Paul L. Erickson, the child's father wrote to Dr. Jane Stephens, Director of Special Education, Buncombe County Public Schools. He stated, "We have been doing an in-home behavioral modification program with C. E.", and, "I am writing this letter to ask that you assist me in obtaining reimbursement for this in-home program."

16. On March 1, 1996, the child was four years old. North Carolina law requires that children with disabilities ages 3-20 be provided a free appropriate public education (FAPE). (Handbook on Parents' Rights Public Schools of North Carolina, 1997, p. 2)

17. The Respondent's agent, Dr. Stephens, initiated evaluation procedures to determine if the child met the criteria for special education services. M. E. consented to the evaluation and was provided with a copy of the Handbook on Parents' Rights.

18. At a meeting on May 31, 1996 attended by school personnel and the child's parents, it was determined that the child was eligible for special education services as a child with Autism. An Individualized Education Plan (IEP) was developed. The parents did not accept the plan.

19. On June 12, 1996, the Respondent offered to provide Extended School Year (ESY) sponsored by the Autism Society of North Carolina. The parents rejected the proposal.

20. On September 16, 1996, an IEP was signed by parents with the caveat added, "all rights reserved re. Lovaas."

21. On October 23, 1996, Mr. Erickson wrote the Respondent and requested reimbursement for the in-home Lovaas program and for the child's attendance at a private preschool.

22. Subsequent IEP meetings on January 6, 1997 and January 28, 1997 were conducted. The parents did not respond to the Respondent's suggestion that the IEP be implemented.

23. At the parents' request, the child was reevaluated. On June 12, 1997, the Respondent's IEP team determined the child no longer qualified for special education services. He was exited from the program.

24. On July 29, 1997, Paul L. Erickson, Esquire, wrote the Respondent's attorney, Ms. Cynthia Lopez, "to make one final attempt to convince you and your client to reimburse M.E.", for the child's in-home educational program.

25. In the July 29, 1997 letter, Mr. Erickson stated, "We are asking that your client agree to reimburse (M.E.) in the amount of $37,804.12 within ten days of the date you

receive this letter...". He concluded, "If you have not provided a written response to me within ten days from the date of this letter, we will immediately proceed to a due process hearing."

26. On August 7, 1997, the Respondent rejected Mr. Erickson's request for reimbursement for the in-home Lovaas program. The Respondent informed Mr. Erickson that the school system believed the program offered the child during his eligibility period satisfied all requirements of FAPE. The letter also contained a copy of the reauthorized IDEA, and the new notice provisions for filing a due process petition.

27. The following day, August 8, 1997, the Respondent's counsel wrote the Petitioners and rejected their request for reimbursement, but made a counter offer. The Petitioners did not respond.

28. Depositions of Petitioner's expert witnesses, Dr. Andrew L. Egel and Dr. Stephen L. Luce were taken on August 17-18, 1998. Neither expert had received any materials related to the program offered by the Respondent's school system in this case. Neither were prepared to testify as to the appropriateness of the Respondent's program for the child.

29. In the amended September 8, 1998 affidavit of Dr. Jane Stephens, she stated at least two copies of the Handbook on Parents' Rights had been provided to the Petitioners in this matter. The Handbooks were the 1993 version and the

1994 version. Both editions contained the same information concerning the sixty (60) day statute of limitations for filing a petition. (G.S. § 115C-116)

Impartial Due Process Hearing and State Review

A parent or public agency may file a petition for an impartial due process hearing (sometimes called administrative review or contested case hearing) to challenge the identification, evaluation, or placement of a child or the provision of a free appropriate public education for the child. This kind of hearing places the responsibility for resolving the conflict on an administrative law judge in the Office of Administrative Hearings, an agency that has no relationship with the education agency or with the State Department of Public Instruction.

A. In order to exercise the right to a due process hearing, the parent must file a petition within 60 days of written notice of the contested action with the Office of Administrative Hearings (424 N. Blount Street, P. 0. Drawer 27447, Raleigh, NC 27611-7447. For additional information concerning the filing of a petition, parents should contact the Office of Administrative Hearings, telephone 919/733-2698.

(Handbook on Parents' Rights, North Carolina Department of Public Instruction. 1993 Addendum; 1994, p. 12.)

30. In the September 8, 1998 affidavit of Petitioner M. E., she affirmed that copies of the Handbook were provided to

"me or my attorneys" on a number of occasions by representations of the Buncombe County Board of Education. The child's education record includes acknowledged receipt of the Handbook (1994, p. 12; 1997, p. 26-27) by either P. E. or M. E. on March 25, 1996 and June 12, 1997.

31. P. E. is also an attorney of record in this matter.

32. On September 8, 1998, Attorney Stephen J. Gabenstein revised his previous affidavit, and conceded he had received a 1993 copy of the Handbook which included information in the addendum about the sixty day statute of limitations.

33. Petition for a Contested Case Hearing was filed by M. E. on behalf of her son C. E., vs. the Buncombe County Board of Education, two hundred fifty seven (257) days after Respondent's August 8, 1997 rejection of the Petitioner's request for reimbursement.

34. At the September 14, 1998 Hearing, the Court ruled that Paul. L. Erickson be named a party in interest on the *Petition*. Mr. Erickson's law firm served as the Petitioner's counsel.

35. Mr. Erickson objected to being named a party. He argued, "If I am named a party, Your Honor, there is a case that says that I may not recover attorney's fees for my time..."

36. Counsel for Petitioners and the Respondent submitted Written Arguments on November 25, 1998.

37. Upon review to the Review Officer for the North Carolina State Board of Education, the issues to be decided were:

    1. Whether the Petitioners' action is time barred by the applicable statute of limitations;

    2. If not, whether the Petitioners fail to state a claim for which relief can be granted under the Individuals with Disabilities Education Act ("DEA") in that Petitioners sought public funding for a particular educational methodology; and

    3. Whether this Court has jurisdiction to hear claims brought pursuant to the United States and North Carolina Constitutions, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Section 1983.

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction with regard to this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and 20 U.S.C. § 1400 et. seq, the Individuals with Disabilities Education Act (IDEA).

2. The Court does not have jurisdiction over Petitioners' claims made pursuant to the Americans with Disabilities Act (ADA), the Constitution of the United States and the State of North Carolina, Section 504 of the Rehabilitation Act, Section 1983. (G.S. 115C-116(c), and Section 1983)

3. By letter dated November 9, 1998 and received November 19, 1998, the Director of the North Carolina Exceptional Children Division appointed the undersigned Review Officer to review the case.

4. The Review Officer has jurisdiction with regard to this case pursuant to Chapters 115C and 150B of the North Carolina Statutes and 20 U.S.C. § 1400 et. seq. (IDEA).

5. The procedures at the hearing were consistent with the requirements of due process. (N.C.G.S. 115C-116; Procedures Governing Programs and Services for Children with Special Needs, 1996; 20 U.S.C. § 1415; 34 C.F.R. 300.500 et. seq.)

6. The Respondent rejected the Petitioners' "final attempt" to receive "reimbursement" for the in-home Lovaas Program on August 8, 1997. The A.L.J. did not err in his decision that on August 8, 1997, the time limitation on the statute of limitations in this case began to run.

7. On April 22, 1998, the date on which the *Petition for a Contested Hearing* was filed, the child was not a child with a disability, and therefore did not meet the criteria for

special educational needs. The child was a child without disabilities on August 8, 1997.

8. The *Petition* complained that the "Respondent failed to provide FAPE." In this case, prior written notice by the Respondent, which could signal the time limitations on the statute of limitations to commence, is not required under IDEA. Written notice by the Respondent to the Petitioner is required only when the agency, "Proposes to initiate or change the identification, evaluation, or educational placement of the child on the provisions of FAPE, or refuses to initiate or change the identification, evaluation, or educational placement of the child on the provisions of FAPE (34 C.F.R. 300.504-505; 20 U.S.C. § 1415; G.S. 115C-115; Handbook on Parents' Rights; Procedures Governing Programs and Services for Children with Special

9. Since the child was a child without disabilities on August 8, 1997, and April 22, 1998, the Respondent was not required to provide the Petitioners with "prior written notice."

10. IDEA is silent on time limits imposed upon Petitioners when requesting a review of a contested case. Hence, State law prevails, N.C. G. S. 115C-116(d) states, "the administrative review shall be initiated and conducted in accordance with Article 3 of Chapter 150B of the General Statutes, the Administrative Procedures Act." 150B-23(f) clearly states, "Unless another statute or a federal statute

on regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days."

11. The 60 day time limitation is stated in all copies of the Handbook on Parents' Rights provided to M.E. andP.E., and counsel, on numerous occasions by the respondent.

12. The time period between August 8, 1997, the date on which the statutes of limitations began to run, and April 22, 1998, when the Petitioners filed the Contested Case, without question exceeds the 60 day time limitation.

DISCUSSION

The issue in this Contested Case is, "Whether the Petitioners' action is time barred by the applicable statute of limitations."

The case is not about FAPE. It is not methodology, reimbursement, an I.E.P., Lovaas or TEACH, depositions or expert witnesses, or all other case law, exhibits, and arguments not related to "timeliness".

The undersigned Review Officer must decide:

What applicable North Carolina statutes govern the matters in this case?

N.C.G.S. 115C-116(d) directs the Court, Counsel, and Review Officer to the Administrative Procedures Act, 150B-23 for clarification. The APA establishes a 60 day limitation for the filing of a petition from the date of notice.

Was Notice provided by the Respondent which would trigger the statute of limitations?

Since the child on August 8, 1997, and March 30, 1998 was not a child with special educational needs, prior written notice under IDEA (1997) Section 615(b)(3) was not required. The August 8, 1997 letter from the Respondent which rejected Petitioners claims for reimbursement, satisfied the requirements of § 150B-23.

Were the Respondents and Counsel informed of their due process rights?

The Review Officer rules in the affirmati[ve]. The Handbook on Parents' Rights, which describes and explains the parents due process rights, was provided to M.E. and P.E., and their counsel on several verifiable occasions.

Was the March 30, 1998, Petition timely?

The Petition exceeded the 60 day APA limitation by 197 days.

Therefore, based on the Findings of Fact and Conclusions of Law, the Review Officer makes the following:

DECISION

The Administrative Law Judge did not err in deciding that the Respondents' *Motion for Summary Judgement* be granted.

NOTICE

Any party aggrieved by this Decision may institute a civil action in State court as provided by North Carolina Statutes 115G. 116 within 30 days after receipt of this decision.

This the 3rd day of December, 1998.

J. Sherwood Dunham
State Review Officer

STATE OF NORTH CAROLINA

BEFORE A STATE HEARING REVIEW OFFICER
FOR THE STATE BOARD OF EDUCATION
PURSUANT TO N.C.G.S. 115C -16

[PARENTS OF CM]	)	
Petitioners,	)	
	)	
v.	)	**DECISION**
	)	
HENDERSON COUNTY PUBLIC SCHOOLS	)	
	)	
Respondent.	)	

This is an appeal of the following Decision and Orders:

1. The December 11, 1997 Final Decision of the contested case heard by Administrative Law Judge, Meg Scott Phillips.

2. The Order issued March 24, 1997 by Chief Administrative Law Judge, Julian Mann, III. granting Partial Summary Judgment for the Respondent.

3. The Order issued March 24, 1997 by Chief Administrative Law Judge, Julian Mann, III. denying Petitioners' Motion for Sanctions for Affidavit Presented in Bad Faith and Petitioners' Motion for Reconsideration, Rehearing and Relief from Judgment.

Two cases, 96 EDC 0766 and 96 EDC 1708, involving common questions of **law and fact were** consolidated by Order of Chief Administrative Law Judge, Julian Mann, III on November 14, 1996. The case 96 EDC 0766 was incorporated in its entirety in case 96 EDC 1708.

The records of the case that were received included: nineteen (19) volumes of transcripts of the hearing; one (1) volume of the transcript of the hearing on motions; the Official Record of the case issued by the Office of Administrative Hearings, sets of exhibits from each of the parties; and additional written arguments submitted by both parties to the Review Officer. The Official Record contained the Final Decision of Judge Phipps, Orders of Chief Administrative Law Judge, Julian Mann, III, written arguments, and documents related to the procedures followed in the contested case.

Having reviewed the records of the case, the Hearing Review Officer for the State Board of Education finds makes the following:

FINDINGS OF FACT

1. A hearing on motions was held on February 27, 1997 by Chief Administrative Law Judge, Julian Mann, III. The nineteen day hearing in the contested case of [Parents of CM] v. Henderson Counter Public Schools was held on March 17, 18, 19, 20, 21, 24, 25, 26, 27 and April 3, 4, 5, 7, 8, 9, 10, 14, 15, 16 by Administrative Law Judge Meg Scott Phipps. All

hearings were held in Hendersonville, North Carolina. The hearings were held pursuant to Chapter 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et. sea.

2. The appeal of this contested case involved the provision of a free appropriate public education to C.M., who at the time of the hearing was 7 years old, having been born on January 10, 1990. (hereinafter C.M. will often be referred to as the child)

3. The Petitioners are the parents of the child, C.M., and are citizens and residents of Henderson County, North Carolina. (hereinafter the Petitioners will often be referred to as the parents)

4. The Respondent, Henderson County Public Schools, is a local education agency (LEA) receiving monies pursuant to the Individuals with Disabilities Act, 20 U.S.C. Section 1400 et seg. (IDEA), and is the agency responsible for providing special education to the child pursuant to North Carolina's Special Education Act, N.C.G.S. 115C, Article 9. (hereinafter the Respondent will often be referred to as the LEA or the school system)

5. The issues in the Petitioners' original petition for the contested case were:

a) Whether the Respondent failed to reimburse the Petitioners for the cost of an independent evaluation.

b) Whether the Respondent should be required to maintain the child in the Petitioners' private setting since the Respondent failed to offer a placement that would provide the child with a free appropriate public education.

c) Whether the Respondent should provide the child with compensatory education, due to the Respondent's failure to develop and appropriate IEP, and its ongoing failure to place her in an appropriate educational setting.

d) Whether the Respondent should reimburse Petitioners for the costs incurred in the Petitioners' private program.

6. Following Partial Summary Judgment granted to the Respondent and Orders issued by Chief Administrative Law Judge, Julian Mann, III on March 24, 1997, the issue for the Hearing before Administrative Law Judge Meg Scott Phipps was whether the program offered by the Respondent for the school year 1996-97 was appropriate for the child.

7. Upon appeal to the Review Officer for the State Board of Education, the issues to be decided were:

a) Whether the Chief Administrative Law Judge properly granted Partial Summary Judgment for the Respondent and thus foreclosed claims against the Respondent prior to the 1996-97 IEP.

b) Whether the Chief Administrative Law Judge properly denied Petitioners' Motions for Sanctions for

Affidavit Presented in Bad Faith and Petitioners' Motion for Reconsideration, Rehearing and Relief from Judgment.

c) Whether Administrative Law Judge Meg Scott Phipps erred in her Decision that the Respondent's proposed IEP for 1996-97 was appropriate.

8. On numerous occasions the Petitioners were provided a copy of the Handbook of Parent's Rights. As of May, 1995 and throughout the remainder of the proceedings of this case, the Petitioners were represented by counsel.

9. The child, C.M., was diagnosed with autism at approximately age two. During the 1992-93 school year, she attended a Montessori preschool in New Hampshire three days a week for three hours a day. She was accompanied to the class by an assistant who was not trained in autism.

10. Mr. William White, a psychologist with experience in autism, consulted monthly with the staff at the Montessori school to discuss C.M.'s autism and assist in her educational programming.

11. The Petitioners moved to Hendersonville, North Carolina in June 1993 in order to take advantage of services from the Treatment and Education of Autistic and Related Communication Handicapped Children (TEACCH) program. They learned of the TEACCH program by attending conferences on autism and researching available programs. They moved based on their understanding that TEACCH is a

nationally known program for autistic students and their families.

12. The TEACCH program, begun with support of the North Carolina legislature in 1972, is a comprehensive system that provides treatment, education and support for autistic children, adults and their families. TEACCH provides evaluations and consultation to school systems throughout North Carolina, the U.S. and the world.

13. The TEACCH philosophy focuses on using meaningful routines and visual clarity to teach autistic individuals to function independently. Through the use of structure and clarity, the autistic person is taught to understand concepts, work skills and expectations. The skills that are learned at the preschool level are built upon as the individual with autism grows older, leading to greater independence and adaptability in the classroom, home setting, group home, vocational or supported employment. settings. The TEACCH approach focuses on the student's strengths and on what children with autism personally find motivating or interesting and utilizes these in a creative manner to teach new skills.

14. In July 1993, C.M. was evaluated by Sloan Burgess at the TEACCH center in Asheville, North Carolina. Sloan Burgess had extensive experience working with individuals with autism. She conducts diagnostic evaluations, provides consultation to school systems, provides parent and professional training and organizes and conducts support groups for families. Ms. Burgess testified that during the testing C.M. showed areas of

substantial deficit in social relatedness. She displayed no functional language except for the word "no" but she babbled throughout the evaluation.

15. In August 1993, the Petitioners along with Sloan Burgess, met with school personnel to develop an IEP for C.M. The Petitioners, Ms. Burgess and school **personnel agreed** that C.M. should be served in the TEACCH preschool classroom which was just being developed at the Helping Hand Center, a private contracted program housed in one of the Respondent's schools. C.M.'s IEP called for her to be in a full day program specially designed for students with autism. This was the first time C.M. had been placed in a class specially designed for autistic students. A typical class day involved group time and individualized instruction for each student. C.M.'s IEP also called for two half-hour sessions of speech therapy weekly.

16. William White, the parents' previous consultant in New Hampshire, also advocated placement of C.M. in the Helping Hand TEACCH class. In a consultation report provided to school personnel in August 1993, he gave numerous suggestions. These were incorporated into C.M.'s IEP.

17. The Helping Hand classroom had a program of reverse mainstreaming wherein regular students would spend periods of time in the special class in order to provide opportunities for interaction with appropriately developing children. Two students in the special class were also mainstreamed for short periods of time each day. Ms. Arledge, the classroom teacher, and Ms. Burgess testified that in their opinion mainstreaming

was not appropriate for C.M. at the beginning of the school year, but it would have been an option later in the year if she gained enough skills to make it appropriate.

18. Although C.M.'s IEP called for a full-day program, the Petitioners only brought her for half day during most of the time she was enrolled.

19. Although the Petitioners dispute the fact, the record is clear C.M. was making some progress in the schools program in the Fall of 1993. Some language was beginning to emerge and C.M. was learning some skills. There also were no behavioral problems. It is also clear that the parents were not satisfied and were continuing their search for a program that they thought would be better for their child. The parents, however, did not voice their concern to school officials that they thought the program being provided for C.M. was not appropriate.

20. On November 23, 1993, the Petitioners removed C.M. from the Helping Hand classroom. In a letter of that date to the supervisor for Exceptional Children's program for the Respondent's schools, the father indicated there were two reasons for removing C.M. These were the published results of studies that the behavioral (Lovaas) approach is highly successful, and the Petitioners' belief that the Montessori classroom was the best placement for C.M. He did not express any discontent with the TEACCH program or infer that the program being provided by the Respondent was not appropriate.

21. Prior to the unilateral removal by the Petitioners, C.M. spent approximately three months in the Respondent's classroom, half-days for much of that time rather than full-days as specified in the IEP. Several creditable experts testified at the hearing that this was not a sufficient amount of time to judge the success of C.M.'s program in light of her age and her lack of prior enrollment in a structured classroom for students with autism.

22. The Petitioners had learned of the Lovaas program in October 1993 by reading a book by Catherine Maurice in which Ms. Maurice recounts the "recovery" of her two children from autism. After reading the book, in mid-October 1993, the Petitioners arranged for a Lovaas training workshop. The workshop was scheduled for December 1993. Shortly thereafter the Petitioners began the Lovaas program in their home, along with part-time enrollment in a private school. This program continues through the time of the contested case hearing.

23. The Lovaas program is described in program literature as a "treatment" approach that specializes in helping preschool children who are autistic and/or mildly to moderately retarded. The program uses behavioral techniques derived from the research of Dr. Ivar Lovaas of the UCLA Psychology Department conducted in the 1970's. The Lovaas research, published in 1987, claimed that 47% of the 19 subjects in his study achieved normal educational and intellectual functioning by 7 years of age. The program emphasizes discrete-trial teaching, involving the use of repeated verbal prompts to elicit specific verbal or behavioral responses. Positive reinforcers

such as candy, tickles and verbal praise are used to reward correct responses. Contingent aversive NO's spoken in a loud voice are used as negative reinforcers. Other negative consequences are delivered for unacceptable behavior.

24. Dr. Lovaas has established a for-profit center to provide Lovaas workshops, designed to help families set up treatment programs of their own. Through the workships, parents and staff members (recruited by the parents) are trained in the Lovaas method. Staff members are referred to as "therapists." They do not require **any special credentials** or previous experience to be fied qualified to be therapists. The Lovaas Clinic recommends dependable college students as good candidates. In addition to training the staff, the Lovaas program provides a UCLA consultant who visits the home site quarterly to monitor and advise regarding the program. The consultants may be graduate students or recent college graduates who have worked in the Clinic.

25. Although C.M. was no longer receiving special education services from the Respondent's schools following her unilateral removal from the school program, the Respondent agreed to continue to provide speech language services. In January 1994, an IEP meeting was held to develop a new speech IEP for C.M. and her speech service time was increased to two hours a week. The Petitioners have been satisfied with the speech services provided by the Respondent, which have continued through the time of the contested case hearing.

26. On December 21, 1993, the Petitioners began implementing the Lovaas program with C.M. for 20 hours a week. Initially, they were contracting with a consultant out of Chicago for the Lovaas program, for they could not get services directly from Dr. Lovaas' program at UCLA. They were on a waiting list with the UCLA program, and in August 1994 were able to drop the services of the Chicago consultant and contract for services with the UCLA program.

27. The Petitioners testified that they knew the Lovaas program was working for C.M. because she went from being nonverbal to using words within the first months of the program. The mother testified that C.M. was unable "to imitate a single thing" or to repeat any words "on command" prior to starting Lovaas. The records, however, of the speech therapist, Karen Perella, show that C.M. was able to both imitate motions and to say certain words in October and November 1993. Ms. Perella testified that C.M.'s language was emerging at that time prior to her beginning the Lovaas program.

28. In August 1994, as the Petitioners began working with the UCLA Lovaas program, C. M.'s therapy was increased to 40 hours a week and her amount of time in school decreased. The father met with Candy Priest, the special education supervisor for the Respondent, and requested a copy of C.M.'s student records. At that time, Ms. Priest informed the father that the school system could provide special education services to C.M. at her private school. The father declined the offer, indicating that he and his wife did not want the private school to know that C.M. had autism.

29. In December 1994, the father contacted Candy Priest to request that the school system begin paying for the Lovaas program. Ms. Priest indicated that it would be necessary for the parents and school personnel to meet to discuss C.M.'s educational needs and to determine an appropriate educational placement for her. In January and February 1995 the parents and school personnel held a series of meetings to develop an IEP for C.M.

30. While in the process of developing the IEP, Judy Cook, the Director of Exceptional Children's Programs, and Sharon Burlingame, a special education teacher, visited the Petitioners' home to observe the use of Lovaas therapy with C.M. Judy Cook testified that C.M. appeared very tired during the therapy and hit herself in the face several times out of apparent frustration and weariness .

31. On February 15, 1995, a final IEP meeting was held. At that time, the school based committee considered four possible programs for C.M.: the Helping Hand Classroom, Sharon Burlingame's classroom, the TEACCH classroom at Bruce Drysdale school and the Lovaas program. The committee recommended that C.M. be placed in a full-day program for autistic students at Bruce Drysdale school with some mainstreaming in a regular kindergarten classroom. The Petitioners continued to request that the school system pay for the Lovaas program. Judy Cook indicated in the meeting that it was her belief that the Lovaas program was too restrictive for C.M. and that the program offered by the school system was more appropriate. The parents pointed to the Lovaas study and

indicated that unless the school system could provide comparable data showing 47% of the students becoming indistinguishable from regular education students then they felt the Lovaas program was the best option. From testimony of the parents, it was clear that they thought their daughter could "recover" from autism.

32. The next day, February 16, Judy Cook sent the Petitioners a letter detailing the rationale behind the school-based committee's decision. Mrs. Cook enclosed a Parent's Rights Handbook and explained in the letter that the Petitioners could pursue a due process hearing in light of their disagreement with the school system's offer of services. No attempt was made by the parents to pursue the due process hearing, even though they disagreed with the Respondent's proposed program.

33. The Petitioners initially indicated in the spring of 1995 that they would like to pursue mediation with the school system over the placement decision. Although attempts were made to schedule a mediation, it never occurred. In May 1995, the Petitioners wrote to Judy Cook and stated that they had obtained representation by the Governor's Advocacy Council and that they were not available for mediation. The Petitioners never pursued mediation after that point.

34. At the end of June 1995, the Petitioners requested that the school system pay for an independent educational evaluation of C.M.. Because the most recent evaluation of C.M. was at that point over a year and a half old, Judy Cook requested that the school system be allowed to test C.M. first and that the

Petitioners could obtain an independent evaluation if they disagreed with the results of the school system's evaluation.

35. An evaluation of C.M. was conducted by school personnel in August and **September 1995.** In October 1995 the Petitioners and school personnel met to review the results of the evaluation. The mother requested that one portion of the testing be readministered. It was redone but the results did not markedly change.

36. Because the IEP offered by the schools in February 1995 and rejected by the parents was to expire in January 1996, school personnel invited the parents to meet in November 1995 to begin developing an new IEP. A school-based committee meeting was held in November and at that time school personnel presented to the Petitioners a draft IEP to begin the discussions. The Petitioners stated that C.M. had already mastered many of the proposed goals and objectives. Some time after the meeting, the Petitioners provided school personnel with a copy of the draft IEP that had been reviewed by Michael Guiou, their UCLA Lovaas consultant, and on which Mr. Guiou indicated many areas that C.M. had "mastered."

37. The concept that skills had been "mastered" was discussed at length during hearing. It is apparent that the Lovaas program uses the term "mastered" in a very unique fashion. If a child is successful in demonstrating the skill in the Lovaas therapy using discrete trial teaching (one-on-one), the skill is considered mastered. Extensive records were maintained by the

Petitioners regarding this "mastery." The record, however, clearly shows that C.M. could not perform many of those "mastered" skills in other environments, such as the school setting. Also, a significant discrepancy was noted between the performance of the child on standardized instruments used in evaluations and the parents records showing mastery. Many or the skills reported as "mastered" in the parents therapy records were not actually "mastered."

38. December 1995 the Petitioners renewed their request for an independent educational evaluation stating that the evaluation conducted by school personnel was insufficient. Judy Cook replied that the parents could pursue an independent evaluation and they would be reimbursed up to $1200 (the school system's maximum amount for independent evaluations).

39. On January 3, 1996 the Petitioners and school personnel jointly agreed to postpone the development of C.M.'s full IEP for the 1996-97 year until the independent evaluation was completed. C.M.'s speech therapy IEP was reviewed and services continued to be provided by Respondent.

40. Judy Cook provided the Petitioners with a list of licensed professionals in the area who could perform an independent evaluation. The Petitioners rejected all those listed, and informed Ms. Cook that they were obtaining an evaluation from outside the state. Ms. Cook again notified the parents of the $1,200 reimbursement limit for independent evaluations. From testimony of the Petitioners, it was apparent that they did

not want an unbiased evaluator to evaluate C.M. They clearly wanted an evaluator who had been involved with the Lovaas program and would favor that methodology.

41. In January 1996, long before the independent evaluation was complete, the Petitioners wrote to Michael Guiou, their Lovaas consultant, stating that C.M. will be attending a small private school next year with eight or nine children and that the teacher of the class would be working with C.M. over the summer.

42. In March 1996, Dr. Jan Handleman, an educator and professor in New Jersey, conducted an assessment of C.M. Dr. Handleman had prior experience with **the Lovaas program.** His assessment consisted of a review of C.M.'s file, a videotape provided by the Petitioners, and an observation of C.M. working with her Lovaas therapist. Dr. Handleman conducted no formal testing. The assessment, provided to school personnel in early April 1996, provided no information on C.M.'s present level of educational performance, a necessary element for the development of an IEP. The primary recommendation of Dr. Handleman's report was that C.M. continue to be served by the Petitioner's Lovaas program.

43. The Petitioners were reimbursed for a total of $1,200 for Dr. Handleman's assessment. The total cost, including related travel expenses, was alleged to be $2,648.21. The Petitioners provided no unique circumstances for such a high cost of the assessment, especially since many qualified local professionals could have performed the assessment for $1,200 or less. The

Respondent introduced evidence that there were numerous evaluators who could have performed the evaluation within this cost limit. Because of the Respondent's refusal to reimburse the full amount, the Petitioners filed their first Petition for a Contested Case Hearing on June 25, 1996. Initial proceedings for the case, 96 EDC 0766, were begun by Judge Mann. No. hearing was held in this initial case, for in the interim, the Petitioners filed a subsequent Petition for the case, for in the interim, the Petitioners filed a subseqquent Petition for the case, 96 EDC 1708, and asked for the cases to be consolidated. Judge Mann consolidated the two cases, including the initial case in its wntirety within 96 EDC 1708.

44. The parents and their Lovaas consultant, Mr. Guiou, had both indicated that C.M. had mastered many of the draft goals and objectives on the last proposed IEP, and this was inconsistent with the most recent testing that was done in August and September of 1995. School officials were expecting to obtain relevant information from Dr. Handleman's report. Such was not the case. Dr. Handleman's report was not sufficient to assist in IEP development. As a result, the school system sought the assistance of Dr. Victoria Shea, an expert in autism, to informally assess C.M. in order to provide information for IEP development.

45. The Petitioners agreed to Dr. Shea's involvement. Dr. Shea reviewed all of the records available on C.M. and observed her in both her home program and at her private school on May 20, 1996. Dr. Shea also observed in two public school classrooms that could possibly be used as placements for C.M. Dr. Shea

noted that C.M. was very compliant during the observation period but that she became quite confused when whe was not given prompts. C.M. did not initate any contact with her peers during the observation period at school. It appeared that C.M. had memorized some language but was unable to use that language functionally in many cases.

46. Dr. Shea recommended that IEP goals be written in several specific areas. In particular, C.M. needed work in developing independence and functional language. Self-help skills and academics should also be emphasized.

47. Although Mr. Guiou and the Petitioners indicated that C.M. had mastered numerous skills, C.M. was not able to perform those skills when Dr. Shea observed her. In light of the conflicting information regarding C.M.'s performance levels, Dr. Shea advised that C.M. should be given more assessments to gauge her present level of functioning.

48. The evidence showed that the skills that Mr. Guiou and the Petitioners claimed C.M. had "mastered" in February of 1996, were not mastered in the school environment as documented by C.M.'s teachers at the preschool in which she was then enrolled. The teachers, responding to a questionnaire from the mother, noted that many of the goals which had been proposed for C.M.'s IEP in November 1995 were either not attained or were emerging by May 1996. Mr. Guiou's report of C.M.'s mastery was not reliable. The evidence also showed that the skills claimed as "mastered" by Petitioners at the time of the hearing, were not "mastered" in the school environment or across all

settings but rather only mastered in the one-on one therapy environment. These inconsistencies caused the school system to question the evaluation information being provided by the Petitioners and it became even more important for school personnel to do additional observations or informal assessments in order to develop an IEP.

49. On May 29, 1996, Laurie McDanel and Janna Forst visited the Petitioners' home in order to observe C.M. in her Lovaas program. The purpose of the visit was to gather more information on C.M.'s present level of performance for the IEP development. Ms. McDanel testified that when she and Ms. Forst entered C.M.'s therapy room, C.M. did not look up or acknowledge their presence. She noted that the therapy appeared to elicit information from C.M.'s rote memory, rather than eliciting spontaneous communication. As a professional educator, Ms. McDanel believed the therapy to be too intense in light of the limited amount that C.M. was able to do during the time period.

50. In order to follow up on the visit, Ms. McDanel met again with the mother prior to the IEP meeting to discuss C.M.'s present level of performance and her needs. This information was used in developing the IEP.

51. An IEP meeting was scheduled for June 5, 1996. Following Dr. Shea's recommendation, Judy Cook requested that a teacher administer the Brigance test with C.M. prior to the meeting so that the IEP committee would have very current information on C.M.'s current level of academic functioning.

The Petitioners would not **agree to the administration** of the Brigance by school personnel and instead stated that they would have it done privately and requested that the IEP meeting be rescheduled.

52. In late July 1996, the Petitioners took C. M. to be evaluated by Dr. Thomas Boyle, a private psychologist in New Jersey who had worked with Dr. Lovaas. Dr. **Boyle conducted intelligence** and achievement testing with C.M. Dr. Boyle admitted in his report and in his testimony that he deviated from standard administration of the tests in several areas in order to try to elicit responses from C.M. He also acknowledged that these deviations from the norms could have resulted in inflating C. M.'s scores on the testing. At the parents' request, Dr. Boyle did not report C. M.'s IQ score in his evaluation report. Her IQ placed her in the mildly mentally handicapped range. Her achievement scores indicated that she was functioning at the beginning kindergarten level in math and reading. Dr. Boyle testified that C.M. needed lots of prompting during the testing and that sometimes he had to reword questions to elicit responses from her.

53. Dr. Boyle's report recommended continuation of the Lovaas program with C.M. including 15-20 hours of one-on-one discrete trial teaching. There was nothing in Dr. Boyle's testing results which would lead to the conclusion that the only appropriate program for C.M. would be the Lovaas therapy using discrete trial teaching or 15-20 hours of one-on-one.

54. The Petitioners also hired Dr. Jan Blacker, an education professor from California, to visit the Respondent's classrooms for autistic students and to observe C.M. in her home program. Dr. Blacker testified that her area of expertise is not autism. In her correspondence with the parents and prior to visiting the school system or having any contact with C.M., Dr. Blacker stated that she would do everything she could to assist them in getting funding for their home program. Dr. Blacker visited the classrooms in August 1996, however, none of the opinions or information gathered in Dr. Blacher's visit were shared with school personnel during the IEP development process in August and September 1996.

55. An IEP meeting was held on August 14, 1996. The Petitioners attended with their attorneys. At that time the committee began developing goals and objectives for the IEP based on the evaluation reports, the observations, and the parents' input regarding C.M.'s progress in her home program. The present level of performance in many areas of the IEP was based solely on parent report because no other information about C.M.'s skill levels was available.

56. At the time of the IEP meeting, the mother's monthly documentation in the home program noted that "C.M. has forgotten a lot of information. Much of what she learned was never generalized completely." The mother testified that she realized C.M. had not generalized skills after receiving Dr. Boyle's report.

57. After the August 14 meeting the Petitioners requested that another meeting be held in mid-September so that their Lovaas consultant, Michael Guiou, could attend and participate in the IEP development. A meeting was held on September 13, 1996, which the parents attended along with Mr. Guiou.

58. Ample evidence was admitted in the hearing through both testimony and exhibits that C.M.'s immediate needs, at the time of the IEP meeting, was the development of her social and communication skills. She also needed to become more independent and not have to rely so much on constant prompting by adults.

59. Despite the fact that C.M. was having significant behavior problems at home and in school at that time, the Petitioners did not share that information with school personnel. The mother also indicated that she could not recall if she had shared information on C.M.'s aggressive behaviors with Dr. Boyle and Dr. Handleman. Dr. Boyle testified that he had no information about C.M.'s behavioral status at the time of his evaluation. The Petitioners later criticized school personnel for not having created a behavioral management plan in the IEP, even though school personnel had no way of knowing C.M.'s behavior was a problem. Behavioral management plans are necessary components in the IEP only if the child's behavior interferes with the child's ability to participate in the educational program.

60. On September 23, 1996, a final IEP meeting was held. The Petitioners attended along with their attorneys. At that time,

both the parents and school personnel agreed that the goals and objectives on the IEP were appropriate. The committee then discussed possible placements for C.M. There was extensive discussion of her need for one-on-one instruction and her need for development of social and communication skills. The committee proposed that C.M. spend half of the school day in a regular kindergarten class with a one-on-one assistant; one hour a day working independently with monitoring in Laurie McDanel's classroom for autistic students, and one and a half hours a day receiving one-on-one instruction in academic areas in a separate room with Laurie McDanel. Ms. McDanel's class was structured according to the TEACCH model and consultative services were available from TEACCH. The IEP also called for three hours a week of speech services (two hours of direct services and one hour of consultation between the speech therapist and C.M.'s teachers).

61. The kindergarten time would be used to work on C.M.'s social skills and communication skills because in the classroom she would have opportunity for peer modeling and interaction. The one-on-one instruction could include some discrete trial teaching but would not be limited to that one method of instruction. In guided practice, C.M. would work in her specific work area in the classroom doing work that had been taught in the one-on-one setting.

62. Laurie McDanel's classroom has two teaching assistants, both of whom have been trained to work with autistic students. A primary goal in Ms. McDanel's classroom is to teach the students to work independently. Each student works

independently for part of the day. Data is kept by the teacher and teaching assistants as to how well the student is completing his or her individual work and progress is noted on the student's IEP. A daily anecdotal log is kept of the each mainstreamed student' s progress in the regular classroom.

63. Although there was agreement that the goals and objectives of the IEP were appropriate, the Petitioners rejected the placement offered by the Respondent. The Petitioners made it clear in the IEP meeting and later in testimony during the hearing that the only placement acceptable to them was in their Lovaas program. Their goal throughout the process was to obtain funding from the Respondent for their Lovaas program.

64. Following the IEP meeting and up to the time of the hearing, the Petitioners chose to maintain C.M. in their Lovaas program and half-day enrollment in a private school. The Lovaas program was being maintained for as much as 47 hours each week, including the discrete trial teaching, the private school program, peer play, and speech therapy. A Lovaas therapist accompanied C.M. at all times in the school setting for the purpose of providing the necessary prompts and to control behavior. The father testified that the total expected cost of the home program for the 1996-97 school year would be between $45,000-$50,000. Although the Petitioners rejected the placement offered by the Respondent, they chose to utilize the goals and objectives of the IEP in their program. Clearly they felt that the IEP was appropriate.

65. Following their rejection of the placement offered by the Respondent, the Petitioners filed a second Petition for a Contested Case Hearing on November 1, 1996.

66. In February 1998, just before the hearing, the Petitioners had C.M. reevaluated by Dr. Boyle. The testing showed that C.M.'s academics were still on beginning kindergarten level (as they had been during his testing eight months earlier). Although C.M. could decode words at the beginning second grade level she was completely unable to perform on the comprehension tests. In other words, she could read words at the beginning second grade level, but was unable to comprehend what she was reading. The IQ testing again showed C.M. to be functioning in the mild mentally handicapped range. Dr. Boyle also conducted some testing of C.M.'s expressive and receptive language. Comparing Dr. Boyle's results with the results of the testing done by the speech therapist in 1995, C.M. had made little progress, particularly in her receptive language.

67. Throughout the hearing before the ALJ, extensive testimony was given contrasting the methodology used in the Lovaas program with that used in the TEACCH program. More time was devoted to this issue than the primary issue to be decided, whether the Respondent offered a free appropriate public education to C.M.

68. Although the hearing was to focus on the appropriateness of **the 1996-97 IEP, extensive** testimony was given and exhibits entered that pertained to the the entire history of the

relationship between the Petitioners and Respondent. The Petitioner was able to enter, often over objections by the Respondent, a rather detailed record of C.M.'s education since 1993. Thus the Review Officer was able to get a relatively clear understanding of events and educational programming that technically had been foreclosed because the Partial Summary Judgment that was granted by Judge Mann on March 24, 1997.

69. Following the filing of the Petition for a Contested Case Hearing on November 1, 1996, extensive discovery proceedings ensued. The hearing was initially scheduled to begin on January 7, 1997. Several motions were made, continuances granted, and orders issued. The hearing was rescheduled several times.

70. On February 14, 1997, the Respondent filed a Motion for Summary Judgment. A Hearing on Motions was held by Judge Mann on February 27, 1997, following which Judge Mann granted partial summary judgment for the Respondent. As the time for the hearing was approaching and his ruling would have a definite impact on the proceedings, Judge Mann announced his ruling in a phone conference **with the parties** on March 5, 1997. He issued his formal Order on March 24, 1997.

71. In his February 27, 1997 Order, Judge Mann granted summary judgment for the Respondent regarding Petitioners alleged cost of an independent evaluation over and above the Respondent's payment of $1,200. This action effectively dismissed the original contested case that was filed June 25, 1996.

72. In his February 27, 1997 Order, Judge Mann also granted summary judgment for the Respondent on all of Petitioners' procedural and substantive claims prior to the development of the 1996-97 IEP. This action effectively limited the issue in the subsequent hearing to the appropriateness of the 1996-97 IEP.

73. As the hearing began on March 17, 1997, Judge Mann heard arguments related to Petitioners' Motions for Sanctions for Affidavit Presented in Bad Faith and Petitioners' Motion for Reconsideration, Rehearing and Relief from Judgment. Judge Mann denied these motions. A formal Order was issued on March 24, 1997.

74. The Orders of Judge Mann issued March 24, 1997 granting Partial Summary Judgment, denying Petitioners' Motions for Sanctions for Affidavit Presented in Bad Faith and Petitioners' Motion for Reconsideration, Rehearing and Relief from Judgment later became issues that were appealed.

75. By Order on March 17, 1997, following a hearing on Petitioners' motions, at 12:37 P.m Judge Mann reassigned the case to Judge Meg Scott Phipps. Judge Phipps conducted the remainder of the nineteen day hearing.

76. Following the hearing, Judge Phipps accepted Arguments and Proposed Findings of Fact and Conclusions of Law from both parties. Judge Phipps announced her decision by letter on November 19, 1997 and requested the Respondent's counsel to assist in preparing the final decision. Judge Phipps accepted the majority of the proposed findings and conclusions provided by

Respondent's counsel, and with minor editing and additions, issued her Final Decision on December 11, 1997.

77. Based on Findings of Fact and Conclusions of Law, the Decision of Judge Phipps favored the Respondent and included the following:

a. C.M.'s proposed IEP for the 1996-1997 school year was appropriate.

b. In order for the IEP to provide the maximum educational benefit to her, the one-on-one aide should be trained in the Lovaas method (discrete trial method) in order to assist C.M. in the transition to the public school system and the TEACCH program.

78. On December 20, 1997 the Petitioner filed Notice of Appeal with the State Superintendent of Public Instruction. For reasons not known, but possibly because of the Christmas holiday period, the request for review was not received in the Exceptional Children Division office until January 9, 1998. That office has responsibility for initiating the review.

79. By letter dated January 12, 1998, and received January 24, 1998, the State Superintendent of Public Instruction appointed the undersigned Review Officer to review the case.

80. On January 26, 1998, the Review Officer requested written arguments concerning the ALJ's Decision from both parties. As the 30 day time limit allotted for the review had already passed, the Review Officer also extended the time for completion of the

review. The review was to be completed within 30 days of receipt of case records. The records of the case were received from the Office of Administrative Hearings on January 30, 1998.

81. Counsel for both Petitioners and Respondent submitted written arguments on February 20, 1998.

Based on the Findings of Fact, the undersigned Review Officer makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Review Officer have jurisdiction with regard to this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and 20 U.S.C. §1400 et. sec., the Individuals with Disabilities Education Act (IDEA).

2. The Respondent is subject to the provisions of applicable federal and state laws, specifically 20 U.S.C. §1400 et. sec. (IDEA) and N.C.G.S. 115C, Article 9. These acts prohibit discrimination because of disabilities and require the Respondent to provide a free appropriate public education for those children in need of special education residing within the jurisdiction of the local educational agency (LEA). The Respondent is the LEA responsible for providing educational services in Henderson County.

3. The child, a resident of the LEA, is a child with a disability for the purposes of IDEA, 20 U.S.C. §1400 et. sea. and a child with special needs within the meaning of N.C.G.S. 115C, Article 9. Being classified as autistic, she is entitled to a free appropriate public education.

4. The due process requirements for parents and children of N.C.G.S. 115C116; Section .1517 of The State Procedures Governing Programs and Services for Children with Special Needs; 20 U.S.C. §1415; and 34 C.F.R. 300.500 et. sec,. were provided to Petitioner. This included provision of a Parent's Handbook to the Petitioners several times.

5. With regard to the partial summary judgment denying reimbursement for an independent evaluation, the Petitioners provided no unique circumstances that justified a reimbursement in excess of the reasonable limit set by the Respondent. The parents were indeed entitled to an independent evaluation of their child, at the expense of the schools, to assist in the provision of an appropriate education for their child. (34 C.F.R § 300.503) This was even acknowledged by the Director of the Exceptional Children's Program in a letter to the Petitioners. The reasonable limit of $1,500 was clearly communicated to the Petitioners prior to the parents choosing to go to New Jersey to obtain an independent evaluation. It is permissible for a school district to establish reasonable maximum allowable charges for independent evaluations, as long as the district provides advance notification of that limitation and gives parents an opportunity to demonstrate unique circumstances for exceeding that limit. The

sole reason for the Petitioners' choice of the psychologist in New Jersey is to utilize an examiner known to be favorable to their chosen methodology for teaching their child. This is not a unique circumstance.

6. The evaluation of a child for the purpose of determining the educational needs of that child is independent of a particular methodology that may be used in delivering the educational program to that child. Several licensed psychologists, with no affiliation with the school system or the TEACCH organization, were available in the region and in North Carolina. A list of available professionals was also provided to the Petitioners prior to their choosing the psychologist in New Jersey. These independent psychologists were capable of evaluating the child. The record is clear that they could and would have evaluated the child for a cost at or below the $1,200 limit established by the Respondent. The Petitioners argument that they are entitled to the excessive costs is without merit.

7. The partial summary judgment for the Respondent regarding the **appropriateness of the educational** program offered prior to the 1996-97 IEP was in accordance with established law in North Carolina. The 60 day deadline for filing for a contested case hearing is clearly spelled out in the Handbook on Parents' Rights, which had been provided to the Petitioners. It is unquestioned that the Petitioners unilaterally withdrew C.M. from the Respondent's program in November 1993. At that time they did not express any dissatisfaction with the program being offered with the Respondent. In the ensuing

period, up until November 1, 1996, the Respondent made offers of educational programs for C.M. on several occasions. In each instance, except for the acceptance of speech services, the Petitioners refused the IEP's offered by the Respondent. Although the record is clear that the Petitioners did not like the IEP's offered because their preferred methodology was not included, they never instituted proceedings available under IDEA and N.C.G.S. 115C, Article 9 to challenge the educational program offered by the Respondent. It was not until November 1, 1996, following the refusal of the 1996-97 IEP, that the Petitioners finally instituted these **proceedings.** Again, the Petitioners were well informed of their rights. They had **received the Handbook** on Parents' Rights. They were informed in letters from the Respondent of their rights. As of the Spring of 1995, the Petitioners were also represented by counsel. It is interesting to note that the parents initially filed a due process petition in June 1996, but only for reimbursement of excessive costs of an independent evaluation. It was not until November 1, 1996 that the parents filed a request for a hearing regarding the appropriateness of an educational program. That the parents chose not to timely exercise their rights to challenge programs offered between November 1993 and November 1996 does not allow them to now challenge those programs.

8. Judge Mann acted appropriately in granting summary judgment for the Respondent for any challenge to the education offered prior to the 1996-96 IEP. The applicable state law, N.C.G.S. §115C- 116(d), clearly states that any administrative review shall be initiated and conducted in accordance with Article 3 of Chapter 150B, The Administrative Procedures Act.

Section 1508-23 of this Act requires that, unless another state federal statute sets a time limitation, the general limitation for the filing of a petition is within sixty (60) of the notice of the contested action. IDEA does not specify a time limit and the state laws specifically adopt the 60-day limitation. When §115C-116(d) and §1508-23 are read together, it is clear that the North Carolina statutory scheme strikes a necessary balance between the need for speedy resolution of special education disputes and the need to allow the parties a fair opportunity to obtain the due process afforded by state and federal law. Therefore, the petition filed November 1, 1996 is not a timely challenge to any action taken by the school system prior to sixty (60) days of that date. Judge Mann did not err in awarding summary judgment for the Respondent on this issue. See Glenn III v. Charlotte- Mecklenburg School Board of Education, 903 F.Supp. at 936 (W.D.N.C. 1995).

9. The Petitioners' argument that there were ongoing negotiations for over 22 months prior to their finally filing for the due process hearing, and that these negotiations should toll the time 60-day period for filing a petition is without merit. As the Petitioners were fully informed of their rights, and were represented by counsel during much of that time period, they had several opportunities to file a petition. They chose not to do so. Despite the allegations now being made by the Petitioners, there was no attempt to mislead the parents. The parents kept asking for funding of their **home-based Lovaas program,** continually rejecting any offer by the schools to provide a program within the school setting. If there was any misleading, it was possibly on the part of the parents. The record is clear -

the parents never intended to enroll C.M. in the school's program during this period, even though they participated in IEP meetings and communicated extensively with the schools. Any program, other than their homebased Lovaas program, was not even a possibility in their minds. Their sole purpose of "going through the motions" to have the Respondent design an educational program for their child was to obtain payment for their own program. That the Respondent may have been capable of furnishing an appropriate education for C.M. was not even considered by the Petitioners.

10. The request for the due process hearing on November 1, 1996 was timely for challenging the 1996-97 IEP, which was offered on September 23, 1996. Thus the focus of the hearing in this case was and should have been on the appropriateness of the education offered by the Respondent in this particular IEP.

11. The Petitioners had requested mediation in March 1995 but never followed through with scheduling the mediation. Although mediation between the parties is not required by IDEA or state law, it was available. The Respondent had scheduled mediation but it was canceled at the request of the Petitioners. The Petitioners made no effort to reschedule even though they indicated that they would do so.

12. Even though the summary judgment presumably restricted the hearing to the 1996-97 IEP, the AU and Review Officer in this contested case clearly have examined issues and events that occurred more than 60 days before filing the request for the hearing. Claims dating back to 1993 were allowed to be

introduced and have been examined by both the ALJ) and Review Officer. Thus the effect of the summary judgment was virtually nullified. Both the ALJ and the Review Officer had the opportunity to determine if the Respondent had failed to provide or offer a FAPE throughout the entire time period, 1993-1996. The ALJ, because of the summary judgment, did not have to make any decision pertaining to the time period 1993-1996. The Review Officer, after finding that the summary judgment was proper, also does not need to address the provision of FAPE during this time period. Because of the extensive evidence regarding this time period in the record, the Review Officer feels that a comment is in order. From the information entered in the record of this case, the Respondent made a convincing effort to offer a program for C.M. on several occasions. That the IEP's were usually not fully completed was often attributed to the failure of the parents to cooperate. Whether, or not those IEP's would have been appropriate is a moot point, for they were left incomplete. Certainly, the speech portion of the IEP's was appropriate, for they have been in effect and unchallenged since 1993. If there was a failing on the part of the Respondent, it was probably in the implementation of the first IEP in 1993. The 1993-94 IEP may never have been fully implemented in the Helping Hands classroom. This, however, became a moot point after the Petitioners unilaterally withdrew C.M. in November 1993, and did not file a petition for a hearing until November 1996.

13. The Order of Judge Mann denying Petitioners' Motion for Sanctions for an Affidavit Presented in Bad Faith and Petitioners' Motion for Reconsideration, Rehearing and Relief

from Judgment was proper. Arguments of the Petitioners notwithstanding, there is nothing in the record that supports that Judge Mann clearly **abused** his discretion. The Petitioners' argument centered on the fact that several letters between Judy Cook and the parents were not mentioned and were missing from the affidavit. This could have easily been an oversight, for it is estimated that about 70 letters were exchanged between the parents and the schools. There was no evidence of "bad faith" as alleged by the Petitioners. These letters were not "newly discovered" evidence, for the Petitioners admitted to having constructive knowledge of the oversight and failed to raise the issue at the hearing on the motion for summary judgment. Also, failing to lisp these three letters in the affidavit did not have a significant effect on the information conveyed by the affidavit.

14. The Order of Judge Mann denying Petitioners' Motion for Reconsideration, Rehearing and Relief from Judgment was proper. Petitioners failed to file affidavits in a timely fashion prior to the hearing on the motion for summary judgment. Although these affidavits were not admitted by Judge Mann at the motions hearing, Judge Mann agreed to grant a continuance so that the Petitioners could file the affidavits. The Petitioners refused the continuance and thus were never able to have these affidavits considered. Because of the subsequent outcome of the motions hearing, the Petitioners regretted that the continuance was refused. This motion was an attempt to correct a tactical error committed by the Petitioners. Judge Mann did not abuse his discretion in denying the motion.

15. The issue before Judge Phipps in the 19 days of hearing was essentially as she stated in her conclusions: "At its core, the dispute is a debate over a choice of educational methodology for the teaching of autistic children. The two methods at issue are the Lovaas method and the TEACCH method."

16. The bulk of the testimony, and the exhibits, were irrelevant to the issue that had to be decided by Judge Phipps. She merely had to determine if the educational program offered by the Respondent in the September 23, 1996 IEP was appropriate.

17. It is the province of the school district and local educators, not that of the courts, to choose sound educational methods when implementing the provisions of IDEA. This concept is clearly enunciated in many decisions by the courts, including Board of Education v. Rowley, 458 U.S 176 (1982); artmann v. Loudon, 118F.3d 996 (4th Cir. 1997); Barnett v. Fairfax County School Board, 927 F.2d 146 (4th Cir. 1991); Lachman v. Illinois State Board of Education, 852 4.2d 290 (7th Cir.), cert denied, 488 U.S. 925 (1988), and Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989).

18. In the absence of procedural or substantive violations of law, courts will not order school authorities to implement a particular educational method when the school has chosen an appropriate educational method. In this particular case, the key is whether or not the Respondent offered an appropriate education. If the program that was offered was appropriate, neither the ALJ nor the Review Officer can substitute their

judgments for that of the school system. The hard and simple truth is, that if the Respondent has offered an appropriate program, there is no requirement to provide the method of the Petitioners' choice.

19. The Petitioners, in the tradition of the majority of concerned and interested parents, were seeking what they considered the "best" for their child. They should be commended for that effort. Indeed, ample evidence was introduced to show that C.M. did make progress through the: utilization of the parents' chosen methodology. The parents respect for the Lovaaa method as being the best for their child is neither disbelieved nor disregarded. 'The law, however, does not require that the public schools provide that which the parents consider the "best" or a "utopian" educational program for C.M. Both Federal and State law, instead, require that public schoolsprovide an "appropriate" education.

20. The educational program offered to C.M. in the 1996-97 IEP, though not the "best" in the minds of the parents, was appropriate. Under North Carolina Law, C.M. is entitled to "a fair and full opportunity to reach her full potential" (G.S. 115C-106), commensurate with that given other children. (Harrell v. Wilson County Schools, 58 N.C. App. 260, 1982) There is no requirement that a utopian educational program be provided for a handicapped child any more than the schools are required to provide a utopian program for the non-handicapped. (Harrell). This concept is even better understood since the Leandro case. In Leandro v. State of North Carolina, 346 N.C. 336 (1997), the North Carolina Supreme Court interpretedthe state constitution

to require that all children are entitled to and must have access to a "sound basic education." A "sound basic education" is one that prepares a child to participate and compete in the society in which she lives and works. Thus C.M. is entitled to an opportunity to reach her full potential commensurate with the opportunity given to other children - the opportunity to a sound basic education. In North Carolina, an appropriate education is nothing more than a sound basic education.

21. A free appropriate public education is defined in 34 C.F.R. § 300.8 as "special education and related services" that:

a. Are provided at public expense, under public supervision and direction, and without charge;

b. Meet the standards of the State Education Agency;

c. Include preschool, elementary school, or secondary school education in the state involved; and

d. Are provided in conformity with an IEP that meets the requirements of §§300.340 - 300.350.

22. In Board of Education V. Rowley, 458 U.S. 176 (1982), the Supreme Court defined appropriate to mean instruction specially designed to meet the unique needs of the handicapped child along with those supportive services that are necessary to permit the child to benefit. The guideline provided by the Court is clear. If the program is reasonably calculated to enable the child to benefit, then an appropriate education is being offered. According to the Court in Rowley, no guarantees regarding performance are established in the law. Instead, the intent of IDEA was more to open the door of public education to handicapped children by means of specialized education

services than to guarantee any particular substantive level of education.

23. Applying the North Carolina standard, there is no evidence that IEP developed for C.M. on September 23, 1996 did not offer a fair and full opportunity for C.M. to reach her full potential commensurate with that given other children. Likewise when applying the federal standard, there is no evidence that this IEP was not reasonably calculated to allow C.M. to benefit. Clearly, the Petitioners approved of all aspects of the IEP except for the methods to be used in delivering the educational program. As stated above, the choice of methodology is the province of the school district. Thus, it is clear that the Respondent offered a free appropriate public education for C.M.

24. Petitioners also contend that the placement of the child in the school district's program will cause the child to regress. They introduced no credible evidence to support this argument, and the testimony of the experts used in this case differed. The argument that regression "might" occur was not convincing. Speculation about a child's adjustment to a proposed program does not afford a basis of finding that the program is inappropriate.

25. Petitioners are not entitled to reimbursement for their educational program, nor are they entitled to any compensatory education, because the Respondent offered an appropriate educational program as defined in federal and state law.

Burlington School Committee v. Massachusetts Department of Education, 471 U.S. 359 (1985).

26. In sum, this Review Officer concludes that the Respondent has offered a free appropriate education for C.M. inasmuch as it has proposed a program that is reasonably calculated to enable her to receive educational benefit and offers her a fair and full opportunity to reach her full potential commensurate with that given other children. Nothing more is required by law.

Based on the Findings of Fact and the Conclusions of Law, the undersigned Review Officer for the North Carolina State Board of Education makes the following

DECISION

1. The Order of Chief Administrative Law Judge Julian Mann, III. on March 24, 1997 granting Partial Summary Judgment for the Respondent was proper.

2. Chief Administrative Law Judge Julian Mann, III. did not abuse his discretion in his Order issued March 24, 1997 that denied Petitioners' Motion for Sanctions for Affidavit Presented in Bad Faith and Petitioners' Motion for Reconsideration, Rehearing and Relief from Judgment.

3. Administrative Law Judge Meg Scott Phillips did not err in her Final Decision of December 11, 1997. The IEP proposed

by Respondent for the 1996-97 school year was appropriate. C.M. was offered a free appropriate education.

4. Administrative Law Judge Meg Scott Phillips also did not err in her Final Decision that the one-on-one aide utilized by the Respondent with C. M. should be trained in the discrete trial method of instruction in order to assist C.M. in the transition to the public school classroom.

NOTICE

Any party aggrieved by this decision may institute a civil action in State court within 30 days after receipt of this decision as provided in N.C.G.S. 115C-116 or file an action in federal court as provided in 20 U.S.C. §1415.

This the 3rd day of March, 1998.

Joe D. Walters
State Review Officer

CERTIFICATE OF SERVICE

I hereby certify that this decision has been duly served on the attorneys of record, the Office of Administrative Hearings, and the State Department of Public Instruction addressed as follows:

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This the 4th day of March, 1998.

/s/ Joe D. Walters
Review Officer

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U.S. DEPARTMENT OF EDUCATION
LETTER OPINIONS

Ms. Judith Raskin
Executive Director
Parent Information Center
P. O. Box 1422
Concord, NH 03302-1422

Digest of Inquiry
February 25, 1991

Does OSERS object to proposed state legislation which would set specific time limits on filing requests for due process hearings, appealing due process hearing decisions to court, and claiming attorneys' fees?

Digest of Response
June 19, 1991

Proposed Time Limits May be Unreasonable and Improper
Proposed state legislation which would establish specific time limits on filing requests for due process hearings, appealing due process hearing decisions in court, and claiming attorneys' fees may unreasonably burden the children with disabilities and their parents and may improperly limit the power of federal courts to hear cases under the IDEA.

Text of Response

This is in response to your recent request for clarification of the issues raised by a bill currently in the New Hampshire Legislature. The bill raises a number of questions related to whether the provisions in the proposed State legislation are consistent with the provisions of Part B. of the Individuals with Disabilities Education Act (Part B) and other Federal statutes.

The proposed bill currently before the New Hampshire legislature that you have asked the Office of Special Education and Rehabilitative Services (OSERS) to review includes a number of provisions which, if enacted, would impose limitations on parents' due process rights under Part B. Because the proposal would impose limitations on the due process rights guaranteed parents by Part B, as well as limitations on the authority of Federal courts, it would, if enacted, create a number of conflicts with Federal law. Our concerns with the various individual provisions of the proposal are as follows:

I. This paragraph would limit the filing of requests for due process hearings regarding individualized education programs (IEPs) to the 60-day period after the date parents must sign the documents indicating their assent to the IEP. Part B, however, grants parents the right to initiate due process on "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," without any time limitation on when that right can be exercised. 20 U.S.C. § 1415(b)(1)(E);

34 CFR § 300.506. Since we can envision many situations in which this 60-day time limitation would be reasonable, e.g., problems with IEP that would not be apparent until much further into the school year, we believe this provision would conflict with Part B.

II. This paragraph, which would limit the period between a hearing officer's final decision and implementation of that decision to not more than 60 days unless pendency had attached or an extension was either mutually agreed upon or granted by the hearing officer, does not appear to be objectionable.

III. This paragraph would create a six-month statute of limitations for appeals to courts of due process hearing officer decisions. While a six-month statute of limitations may not be clearly unreasonable, we believe that this provision presents a conflict with Federal law because it would, by State statute, specifically attempt to limit the power of Federal courts to hear appeals of due process decisions when Federal law imposes no such limitation.

IV.(a) This paragraph would impose a six-month limitation for claims for attorneys' fees for work done in due process hearings, and a six-month limitation for filing lawsuits to recover attorneys' fees for due process for the reasons specified in III, above. With regard to the notice requirement, we are concerned that this provision may raise an additional unreasonable burden on parents' rights as specified in 20 U.S.C. § 1415(e)(4).

(b) This provision specifies that unless the parties agree in writing to the contrary, compliance with the hearing officer's decision and payment or settlement, or both, of attorneys' fees associated with that decision, constitutes agreement and settlement of all issues regarding the merits and fees between the parties. This provision does not appear to be objectionable.

V. This paragraph limits requests for due process and appeals of due process decisions to not more than six months after the end of the child's eligibility for service under Federal law. As specified in III and IV.(a), above, we cannot see that such limitation is clearly unreasonable, but believe that the provision presents a conflict with Federal law because of the limitation it imposes on the power of Federal courts.

We hope that this information is helpful. Please let me know if we can be of additional assistance. Thank you for bringing this matter to our attention.

Robert R. Davila
Assistant Secretary

U.S. DEPARTMENT OF EDUCATION
LETTER OPINIONS

Dr. Juanita S. Pawlisch
Division of Learning Support
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Digest of Inquiry
[Date Not Provided]

- Is a one-year statute of limitations for requesting due process hearings allowable?

Digest of Response
October 22, 1997

One-Year Statute of Limitations Permitted

Since the IDEA lacks a provision specifying a statute of limitations, courts most often borrow the most closely analogous state statute of limitations. In Wisconsin, a proposed statute required a written request for a due process hearing to be filed within one-year of the challenged action, provided the parents were made aware of the limitations period. OSEP stated a 60-day limitations period would be unreasonable, but the one-year period might be allowed. Before enacting the one-

year period, the state was directed to make sure the one-year limit was similar to the most closely related state statute of limitations, and to ensure that federal education claims were not subjected to a stricter statute of limitations than state claims.

Text of Response

The Office of Special Education Programs (OSEP) has completed its review of Wisconsin's 1997 Assembly Bill 261. The Bill provides that the written request for a hearing must be filed within one year after the proposal or refusal of the school board to initiate or change the child's multidisciplinary team evaluation, individualized education program, educational placement, or the provision of an appropriate special education program. The Bill also includes a propose additional, which states that the limitation period would apply only if the parent of a child with a disability received notice of the right to appeal.

Under current Wisconsin law, there is no specific limitation as to when a parent of a child with disabilities may file a written request with the Wisconsin Department of Public Instruction for a hearing to challenge the school board's proposal or refusal to initiate or change the child's multidisciplinary team evaluation, individualized education program, eduational placement, or the provision of an appropriate special education program.

The Individual with Disabilities Education Act does not impose

any time limitations. Under the Act, there is no statute of limitations for either requesting an administrative hearing or seeking judicial review. Although the Congress has created a federal statute of limitations for civil actions arising under Acts of Congress, its application is limited to laws enacted after 1990. 28 U.S.C. § 1658. However, OSEP previously indicated in a letter to Raskin, OSEP 1991, that a 60-day time limit for filing due process requests which had been proposed in New Hampshire would be an unreasonable limitation upon Federal law.

Traditionally, Courts have imposed analogous State statute of limitations on both requests for due process hearings and judicial appeals of those hearing decisions. Dell v. Bd. of Educ., Township High Sch. Dist. 113, 32 F.3d 1053 (7th Cir. 1994); Murphy v. Timberlane Regional Sch. Dist., 22 F.3d 1186, 1192-1194 (1st Cir., 1994); Oak Park and River Forest High Sch. Dist. v. Ill. St. Bd. of Educ., 886 F. Supp. 1417 (N.D.Ill. 1995) rev'd an other grounds. 79 F.3d 654 (7th Cir. 1996). One of the federal interests behind the borrowing of State limitations periods is to ensure that plaintiffs filing federal claims are not subjected to more stringent limitations than are imposed upon analogous State claims. See Wilson v. Garcia, 471 U.S. 261, 276 (1985).

While we are not aware of any case that specifically addresses the relevant statute of limitations in Wisconsin, in reviewing this legislation, the proposed one-year limitations period should be compared to the most analogous State statute of limitations for claims arising under State law. In enacting this limitation

period for IDEA due process hearings, the State should not discriminate against federal claims by making the statutes of limitations more restrictive for this federally protected right than for analogous State-based claims. Further, the application of such limitations in particular cases must be decided by impartial hearing officers and the Courts.

On August 20, 1997, a member of my staff, Ms. Barbara Route, spoke with Ms. Stephanie Petska of your staff, regarding the status of the Bill. Ms. Petska stated that the Bill was being reviewed by the Legislative Reference Bureau, an adjunct to the Legislature. Ms. Petska further stated that the Bureau would be notifying the Wisconsin Department of Public Instruction in October regarding the status of the Bill.

I hope the information in this letter will be of assistance to you. If you have additional questions and/or concerns, please do not hesitate to contact Ms. Route. State contact, at (202) 205-9029.

Thomas Hehir
Director
Office of Special Education Programs

No. 00-1762

(3)

Supreme Court, U.S.
FILED
2001
OFFICE OF THE CLERK

In The
Supreme Court of the United States

C.M., a minor, by and through her parents;
J.M. and E.M., and on their own behalf,
Petitioners,

v.

THE BOARD OF EDUCATION OF HENDERSON COUNTY,
a/k/a Henderson County Public Schools; DAN G. LUNSFORD,
Education Department Superintendent; LINDA R. HAWK, Chairman;
JACKIE H. HORNSBY, Vice Chariman; ERVIN W. BAZZEL;
BRENDA O. BROCK; ALLEN A. COMBS; THOMAS E. ORR;
THOMAS B. PRYOR; JUDY DIANE HARTMAN COOK,
in their official and individual capacities,
Respondents.

M.E. and P.E.,
on their behalf and on behalf of their son, C.E.,
Petitioners,

v.

THE BUNCOMBE COUNTY BOARD OF EDUCATION,
a/k/a Buncombe County Public Schools,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I IF THIS COURT'S DECISION WILL BE ADVISORY, THE FOURTH CIRCUIT'S DECISION WAS ADVISORY AND SHOULD BE REVERSED.

In its brief at page 12, Respondent argues Petitioners are not aggrieved parties, thus lack standing to seek redress by this Court. It further argues that this Court, like all federal courts, under U.S. Const. Art. III §2 and *Carolina v. Rice*, 404 U.S. 244, 246 (1971) cannot provide advisory opinions. Petitioners agree with this statement of law but contend that Petitioners are aggrieved and do have standing to bring this Petition.

Based on Respondent's argument and contentions, the Fourth Circuit's decision in this case violates the very provision that Respondent argues as supporting Respondent's position that this Court cannot hear this appeal. For, if Petitioners were not aggrieved by the application of the sixty day statute of limitations, the Fourth Circuit decision holding that North Carolina's sixty day statute of limitations would constitute an impermissible advisory opinion.

Rather than issuing a decision that obviously violates U.S. Const. Art. III §2, the Fourth Circuit would have written, "having concluded the proper notice was not provided to trigger the application of the sixty day statute of limitations, we need not and may not determine whether that is the most analogous statute to apply or whether it violates the underlying policy of the IDEA." To the contrary, the Fourth Circuit wrote:

> Thus, we hold the 60-day limitations period in § 150B-23 is the period associated with the state statute, § 115C-116, most analogous to the IDEA.[3] [footnote omitted] . . . *CM v. Bd. of Ed. of Henderson County* 241 F. 3d 374, 380 (4th Cir. 2001)

> . . . Accordingly, although we recognize that in *Schimmel,* we concluded that policies embodied in the IDEA required that we reject a short limitations period,. . . we conclude that adoption of this 60-day limitations period is not inconsistent with federal policies animating the IDEA.
>
> . . . The parents in each case before us contend that even if we should hold, as we now have, that the 60-day limitations period applies to requests for IDEA administrative due process hearings in North Carolina, it does not bar their claims because they did not receive the required notice of the limitations period. . . . *CM, supra* at 384-385.

See also, footnote 12.

> [12] The basis for the district court's holding in *CM* that school authorities provided notice with respect to the 1993-1994 and 1994-1995 school years is unclear. It appears that the district court may not have actually resolved this issue, focusing only on the notice provided as to the 1995-1996 year. **We remand this issue to the district court**, expressing no view on whether notice complying with the statute was provided in the earlier years. We also note that although the ALJ found CM's parents' claims for reimbursement in the 1993-1994 and 1994-1995 school years barred for additional reasons, the district court did not address these reasons, and so we will not consider them in the first instance. *CM, supra* @ 388. (Emphasis added)

Thus, the Fourth Circuit did apply the sixty day statute of limitations to Petitioners. While it reversed the lower courts based on the notice provision as to the 1995-1996 school year due to the failure of the school district to provide proper notice to trigger the running of the statute of limitations. It remanded the case to the District Court for a determination as to whether the Court could find proper notice was given to deny CM's 1993-1994 and 1994-1995 claims.

Either the Fourth Circuit committed reversible error by providing an advisory opinion contrary to U.S. Const. Art. III §2 and *Carolina v. Rice*, 404 U.S. 244, 246 (1971) as argued by Respondent or Petitioners are in fact aggrieved parties and have standing to appear before this Court. In either case, this Court should grant the Petition for Certiorari and reverse the Fourth Circuit's decision in the *CM* and *ME* cases.

II CONTRARY TO EXISTING THE DECISIONS OF THE 1ST, 3RD, 6TH, 8TH, 9TH, 11TH AND D.C. CIRCUITS, ONLY THE 4TH CIRCUIT ADOPTED A 60 DAY OR LESS LIMITATIONS PERIOD FOR INITIAL DUE PROCESS PETITIONS

At page 20 of its brief, Respondent argues the "numerous federal courts similarly have concluded that state administrative procedures laws are most analogous . . . and short limitations periods found within such laws are consistent with the IDEA's goals of prompt resolution of disputes over the education of children with disabilities." referencing the court to *Birmingham*, 17 F. Supp. 2d at 863 (applying Arkansas' 30 day period). Respondent's argument and citation fails to note that the District Court's decision was reversed by the Eighth Circuit in *Birmingham v. Omahas School Dist.*, 220 F.3d 850 (8th Cir. 2000).

In the recent decision of *S.V. v. Sherwood School Dist.*, 254 F.3d 877 (9th Cir 2001), in deciding to apply a two year statute of limitations, the court relied on: *James v. Upper Arlington City Sch. Dist.*, 228 F. 3d 764, 769 (6th Cir 2000) (holding that either a four-year or a two-year limitations period applies to claims under the IDEA in Ohio for reimbursement); *Birmingham v. Omahas School Dist*, 220 F.3d 850 (8th Cir. 2000); (holding that the three-year statute of limitations applicable to §1983 actions in Arkansas governed IDEA claims reversing District Court's application of 30 day statute of APA); *Manning by Manning v. Fairfax County Sch. Bd.*, 176 F. 3d. 235, 239 n. 3 (4th Cir. May 3, 1999) (holding that, in Virginia, a one-year limitations period applies to a request for administrative hearing on a claim alleging a violation of the IDEA); *Murphy v. Timberlane Reg'l Sch. Dist.*, 22 F.3d 1186 (1st Cir. 1994) (applying New Hampshire's "catchall" six-year statute of limitations to a claim for compensatory education under the IDEA); *Strawn v Missouri State Bd of Educ.* 210 F. 3d 954 (8th Cir 2000) (adopting a two year rather than a five year statute of limitations); *Zipperer v. School Board of Seminole County, Florida*,111 F.3d 847 (11th Cir. 1997) (where the 11th Circuit borrowed the four-year Florida statute of limitations applicable to claims based on a statutory liability and rejected the 30-day limitations urged by the school district, while pointing out in footnote 1, in its earlier *JSK* decision it had noted in dicta it would likely borrow the 30 day limitations period for substantive appeals under section 1415(e)(2)).

In the remainder of the string citations in footnote 5 of Respondent's brief virtually all of their citations pertain to limitations for appeals from administrative hearings rather than filing of initial due process complaints. *See: Speigler v. District of Columbia*, 886 F.2d 461 (D.C. Cir. 1989); *Adler v. Education Dept.*, 760 F.2d 454 (2nd Cir . 1985).

As was pointed out by the Department of Justice in its Amicus Brief field in the Fourth Circuit opposing the application of the sixty day limitations period, prior to this decision, no court of appeals, including the Fourth Circuit in *Manning by Manning v. Fairfax County Sch. Bd.*, 176 F. 3d. 235 (4th Cir. May 3, 1999), has upheld application of a statute of limitations as short as 60 days. *See, e.g., Bernardsville Bd. of Educ. v. H.H.*, 42 F.3d 149, 158 (3rd Cir. 1994) (finding that one year is an appropriate time limit for requesting a due process hearing); *Murphy, supra* (six year statute) *Alexopulos v. San Francisco Unified Sch. Dist.*, 817 F.2d 551, 555 (9th Cir. 1987) (applying a three year statute). Clearly, the Fourth Circuit is not aligned with the other Circuit Courts of Appeals.

Petitioners contend in Respondent's brief, it misconstrues *Pawlisch, Letter to*, 29 IDELR 1088 (OSEP October 22, 1997) and *Raskin, Letter to*, 17 EHLR 1116 (OSEP February 25, 1991). Contrary to Respondent's suggestion, neither *Raskin, supra*, not *Pawlisch, supra*, implied the limitations period established an absolute and close-ended 60-day period. In fact, the letters make it clear that pursuant to 20 U.S.C. § 1415(b)(1)(E) (1990) now 20 U.S.C. § 1415(b)(6) (1997) and 34 C.F.R. 300.506 (1996) now 34 C.F.R. 303.420 (1998) a parent could request an IEP meeting at any time to seek a modification of their child's IEP and pursue their child's due process rights if such a request resulted in a disagreement. Thus, Respondent's attempt to limit the application of *Raskin, supra*, and *Pawlisch, supra*, is misguided.

Similarly, Respondent argues that *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) and *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 66 (1986) stand for the proposition that federal courts do not defer to agency interpretations of federal law when the agency's interpretation would alter the express intent of Congress and

an Agency's interpretive guidance is not controlling upon the courts by reason of their authority. In *Kmart, supra*, at pages 291 and 292, the court wrote:

> . . . The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress. . . . If the statute is silent or ambiguous with respect to the specific issue addressed by the regulation, the question becomes whether the agency [486 US 292] regulation is a permissible construction of the statute. . . . If the agency regulation is not in conflict with the plain language of the statute, a reviewing court **must** give deference to the agency's interpretation of the statute. *United States v. Boyle*, 469 US 241, 246, n 4, 83 L Ed 2d 622, 105 S CT 687 (1985). (Emphasis added)

The *Meritor,* court at page 65 wrote:

> . . . [T]he EEOC issued Guidelines . . . While not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. . . .

Respondent also cites *United States v. Mead Corp.*, 533 U.S. ___ , ___ 121 S.Ct. 2164, 2171 (2001) for the proposition that Ill-founded or misguided agency notions must yield to well-grounded and better reasoned contrary judicial interpretation of legislative intent. In *Mead,* this Court wrote:

> We granted certiorari, 530 U.S. 1202 (2000), in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute. **We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.** Delegation of such authority may be shown in a variety of ways, as by an agencys power to engage in adjudication or notice-and-comment rule making, or by some other indication of a comparable congressional intent. The Customs ruling at issue here fails to qualify, although the possibility that it deserves some deference under *Skidmore* leads us to vacate and remand. *Mead, supra,* at __ (Emphasis Added)

Unlike the Customs department, pursuant to 20 U.S.C. 1416 (1991) OSEP was given the power to engage in adjudication or notice-and-comment rule making. Thus, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the *Raskin,* and *Pawlisch,* letters should have been given deference by the courts below. Furthermore, due to the fact that both letters are better reasoned than the decisions of the courts below, based on *Mead, supra,* and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), even if the OSEP letters were not entitled to the *Chevron* deference, they would still be entitled to deferential consideration. Adding the fact that *Pawlisch* is also based on U.S. Supreme Court, authority as well as authority from the First and Seventh Circuit Courts of Appeals, the judicial deference should have been substantial, rather than no deference as advocated by Respondent.

III REJECTION OF THE UNPROVEN IN FAVOR OF THE SCIENTIFICALLY PROVEN IS PROPER

Lovaas or Lovaas type Applied Behavioral Assessment educational programs are the only programs in the world (for children suffering from autism) that provide the opportunity for normal functioning or recovery and that are supported by empirical scientific data as to their effectiveness. Thus, like this Court in the cases of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993) and *Kumho Tire Company v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999), Petitioners rejection of hypothetical or established educational programs, such as TEACCH, which are not supported by scientific research was warranted.

Respondent asserts at p. 6, "Both parents [of CM] testified that the only program they would have accepted for CM was the Lovaas program.." This statement mischaracterizes the testimony of CM's father and mother. Both had tried the TEACCH program as well as many other programs and other interventions. In summary, their testimony was they only received significant positive educational progress in the Lovaas program. On the other hand, it was the members of the School District that made it clear they would not consider offering the only scientifically proven Lovaas type program.

At p. 8-9 of its brief, Respondent asserts that "M.E. stated she would reject a program with a comparable amount of in-home, one-on-one instruction based on the TEACCH method." TEACCH does not do in-home, one-on-one instruction. In addition, M.E.'s son was never offered a comparable amount of in home one-on-one instruction based on any method. The fact that her son, as Respondent notes in its brief at p. 9 "no longer qualified for services" or recovered from autism, after completing his Lovaas program,

corroborates the scientific proof of the Lovaas program. Thus, this serves as an additional rational basis for ME to have rejected a hypothetical program.

At p. 9, of its brief, referring to ME, Respondent asserts: "The parents never responded and no negotiations between parents and Buncombe County Schools regarding services took place after February of 1997." Having successfully completed his Lovaas program so that CE no longer qualified for special education services, it would not make sense to continue to negotiate about services. However, as Respondent makes clear at the bottom of p. 9, the parties continued to negotiate regarding reimbursement for past services.

CONCLUSION

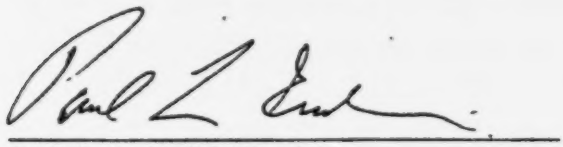
While, procedural safeguards are primarily instituted for the protections of the disabled children, school districts may also take advantage of them. The 45 day and 30 day provisions for conducting due process hearings are available to all parties. Those time limitations, if they are enforced, provide appropriate protections to disabled children and to school districts. The Courts below ignored or overlooked the significance of 45 day and 30 day time limitations imposed by our Legislature. (See: 34 C.F.R. 300.511) Because their decisions were issued well beyond the maximum time lines allowed by the Act, (534 days after the Initial Petition for Contested Case Hearing was filed and 255 days beyond the close of evidence at the local level and 73 days beyond the filing of the appeal at the state level) CM was not able to take advantage of the provision of the decisions requiring the school to use her Lovaas trained aide.

Instead of enforcing the time limitations set by our Legislature for the protection of the disabled, the courts below elected to establish a sixty day limitations period that

will only be used to the detriment of the disabled children. Such action is repugnant to the underlying policy of the IDEA and must be reversed before its application has a chance to infect other school districts throughout the United States.

Respectfully submitted, this the 7th day of August, 2001.

THE LAW FIRM OF PAUL L. ERICKSON, P.A.



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